LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
DEC 20 1950

No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1950

WALTER K. WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Treaty involved	3
Statement	4
Summary of argument	8
Argument:	
Preliminary statement	13
1. The International Labor Organization	18
2. The procedure by which international labor conventions are adopted	22
3. The Shipowners' Liability Convention	26
I. Article 2 of the Shipowners' Liability Convention is effective although implementing legislation has not been enacted	31
A. Paragraph 1 of Article 2 is self-executing	31
B. The exceptions permitted by paragraph 2 are operative by virtue of the general maritime law	38
1. International Labor Conventions are designed to leave room for national discretion as to the manner in which they are to be applied and made effective	40
2. The historical background of the convention reveals no intention to repeal existing legal principles which absolve the shipowner of liability where the seaman is at fault	56
3. The decision below is in accord with the construction given Article 2 by the executive departments	60
II. The court below properly denied recovery of maintenance and cure because of petitioner's misconduct	66
A. Conduct by a seaman in reckless disregard of his own safety is a bar to recovery for maintenance and cure under the Convention and general maritime law	66
B. Petitioner's conduct in the circumstances of this case was in reckless disregard of safety	78
Conclusion	83
Appendix	84

921470—50——1

CITATIONS

Cases: Page

Aguilar v. *Standard Oil Company*, 318 U. S. 724 ..... 2, 7, 12, 14, 15, 39, 69

Bacardi Corp. v. *Domenech*, 311 U. S. 150 31

Card, The J. F., 43 Fed. 92 70

Clarlton v. *Kelly*, 229 U. S. 447 37

Cook v. *United States*, 288 U. S. 102 17

Dainese v. *Hale*, 91 U. S. 13 31

Delaware & H. R. Corp. v. *Bonzik*, 105 F. 2d 341 82

De Zon v. *American President Lines*, 318 U. S. 660 ..... 13, 32

Ellis v. *American Hawaiian S. S. Co.*, 165 F. 2d 999 70

Erie R. Co. v. *Tompkins*, 304 U. S. 64 54

Evens v. *Texas Pac.-Missouri Pac. Terminal R. R.*, 134 F. 2d 275 82

Factor v. *Laubenheimer*, 290 U. S. 276 ..... 17, 37

Farrell v. *United States*, 336 U. S. 511 ..... 13, 32, 35, 39

Fink v. *Shepard S. S. Co.*, 337 U. S. 810 7

Flint, The Ben, 3 Fed. Cas. No. 1299 70

Foster v. *Neilson*, 2 Pet. 253 ..... 31, 43

Head Money Cases, 112 U. S. 580 31

Hust v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 6

Jordine v. *Walling* (C. A. 3) (December 14, 1950) 39, 62

Lage v. *United States*, 90 F. Supp. 583 70

Miller v. *Lykes Bros.-Ripley S. S. Co., Inc.*, 98 F. 2d 185, certiorari denied, 305 U. S. 641 39

Nielsen v. *Johnson*, 279 U. S. 47 17

O'Donnell v. *Great Lakes Co.*, 318 U. S. 36 ..... 13, 32

Olsen v. *Whitney*, 109 Fed. 80 70

Peterson v. *The Chandos*, 4 Fed. 645 69

Reed v. *Canfield*, 20 Fed. Cas. No. 11,641 70

Sullivan v. *Kidd*, 254 U. S. 433 37

United States v. *Arredondo*, 6 Pet. 691 54

United States v. *Percheman*, 7 Pet. 51 54

United States v. *Rauscher*, 119 U. S. 407 31

Valentine v. *United States ex rel. Neidecker*, 299 U. S. 5 31

Waterman Steamship Corp. v. *Jones*, 318 U. S. 724 ..... 14, 15, 32, 38

Constitution and Statutes:

Constitution of the United States:

Article VI, Clause 2 43

Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901–950) 30

Treaties:

International Labor Conventions:

Officers' competency certificates, No. 53 (54 Stat. 1683) 26

Annual holidays with pay for seamen, No. 54 26

Treaties—Continued
International Labor Conventions—Continued Page
Shipowners' Liability Convention, No. 55 (54 Stat. 1693) 26, 28, 29, 35, 84
Article 1 32, 47, 85
Article 2 2, 3, 8, 10, 16, 31, 32, 36, 37, 38, 39, 46, 48, 52, 53, 54, 64, 65, 71
Article 3 32, 47, 48
Article 4 32, 35, 36, 39, 47, 49, 52, 54
Article 5 32, 47, 49, 52, 54
Article 6 32, 47, 50
Article 7 32, 47, 50, 52
Article 8 32, 47, 51
Article 9 32, 47, 51
Article 10 32, 47, 49, 50
Article 11 32, 47, 51
Article 12 32, 47, 51, 52, 53, 54
Article 15 (2) 29
Article 20 53
Hours of work on board ship and manning, No. 57 26
Minimum age for admission of children to employment at sea (revised), No. 58 (54 Stat. 1705) 26
Congressional material:
81 Cong. Rec. 9347 28
83 Cong. Rec. 6046 28
83 Cong. Rec. 9028–9030 28, 63
84 Cong. Rec. 7392 29
84 Cong. Rec. 10129 30
84 Cong. Rec. 10540 30
86 Cong. Rec. 12002 30
87 Cong. Rec. 15 30
87 Cong. Rec. 7434 30
Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 6726, and H. R. 6881, 76th Cong., 1st Sess 29, 64
Hearings before the Subcommittee on the Committee on Commerce, United States Senate, on H. R. 6881, 76th Cong., 3d Sess 30, 64
H. R. 6881, 76th Cong., 1st Sess 29, 30, 33, 63, 64
H. R. 557, 77th Cong., 1st Sess 30
H. Rept. 1328, 76th Cong., 1st Sess 29, 30, 33, 34, 38, 64
S. Doc. 113, 77th Cong., 1st Sess 30
Sen. Exec. Rept. 8, 75th Cong., 3d Sess 28, 61, 62
S. Res. 299, 76th Cong., 3d Sess 30
International Labor Organization Publications:
Constitution and Rules of the International Labor Organization, Conference Edition, International Labor Office, May 1948 20, 22, 23, 26

International Labor Organization Publications—Continued Page

International Labor Conferences:
Geneva 1929, Thirteenth Session, *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen on Board Ship, First Discussion* 27, 39, 55, 58, 59, 72
1929, *Proceedings, Thirteenth Session* 27, 57, 59, 72
1931, *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II) 27, 51–52, 58, 59, 73
1936, *Proceedings, Twenty-First Session* 28, 57, 59, 76
1949, *Conventions and Recommendations: 1919–1949* 26
1950, Thirty-Third Session, Report III (Part I), *Summary of Reports on Ratified Conventions* 29
Geneva, 1950, Thirty-Third Session, Report III (Part IV), *Report of the Committee of Experts on the Application of Conventions and Recommendations* 46
International Labor Office, *Official Bulletin*, November 15, 1946 20
I. L. O. Form for the Annual Report on the Convention 103
I. L. O. Report for period from July 1, 1949, to June 30, 1950 37, 65, 115

Miscellaneous:
29 Am. J. Int'l L. Supp. No. 4, pp. 971–973 54
30 Am. J. Int'l L. Supp.:
pp. 67–85 19
pp. 68–78 18
American Law Institute, *Restatement, Torts* (1934):
§ 500, *Comment g* 67
§ 502, *Comment* 68, 82
Black's Law Dictionary (3d ed. 1933), p. 1074 54
Constitution of the International Labor Organization:
Preamble 18
Article 19 26, 37
Article 19 (8) 51
Article 22 36, 44, 64
Article 23 44, 65
Article 26 44
Article 29 44
Article 31 41
Article 33 44
Article 37 41, 44
Article 387 (Original Constitution) 18
Article 405 (4) (Original Constitution) 29
Dillon, *International Labor Conventions* (1942 ed.) 18, 23, 41, 44
Fried, *Relations Between the United Nations and the International Labor Organization*, 41 Am. Pol. Sci. Rev. 963 20
5 Hackworth, *Digest of International Law* (1943 ed.) 26

Miscellaneous—Continued Page

Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549 17

Letter from Solicitor General to I. L. O. dated October 27, 1950 ..... 41, 97

Memorandum of the Director-General of the International Labor Office 9, 10, 38, 41, 45, 53, 56, 98, 99

4 National Association of Claimants' Compensation Attorneys Law Journal 232 48

2 Nouveau Larousse Universel (1949 ed.), p. 36 53

Research in International Law of the Harvard Law School, *Draft Convention on the Law of Treaties*, 29 Am. J. Int'l. L. Supp. No. 4, pp. 937–971, Article 19 (a) 17

Shotwell (ed.), *The Origins of the International Labor Organization: The Paris Peace Conference—History and Documents* (2 Vol.) (1934) 18

United Nations Charter, Article 57 (2) 20

United States Department of State Publication No. 2851, *United States Treaty Developments* (June 1949), June 28, 1919, T. S. 874 ..... 20, 26

United States Department of State Publication No. 3655, International Organization and Conference Series I, 8, *International Organizations in Which the United States Participates* (1949) 20

United States Treaties, Treaty Series, No. 874 19

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court for the Southern District of New York (R. 97–109, 115–116) are reported at 75 F. Supp. 210 and 76 F. Supp. 735. The opinions of the Court of Appeals for the Second Circuit (R. 137–141, 154–157) are reported at 179 F. 2d 919.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1949 (R. 142). A timely petition for rehearing (R. 143–153) was denied on March 2, 1950 (R. 154–157). The petition for a writ of certiorari, filed on May 24, 1950, was

granted on October 9, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Article 2 of the Shipowners' Liability Convention provides, in paragraph 1, that the shipowner shall be liable for maintenance and cure in cases of sickness or injury occurring during the term of the shipping engagement, but provides further, in paragraph 2, that "national laws or regulations" may make exceptions where the sickness or injury is due to the "willful act, default or misbehavior of the seaman.[1] Congressional legislation implementing the Convention has not been enacted.

In this action, petitioner, a merchant seaman employed by the United States, seeks to recover maintenance and cure for injuries sustained while on authorized shore leave. The court below denied recovery under the general maritime law because of petitioner's misconduct, holding that

[1] Paragraph 2 also permits an exception for injuries "incurred otherwise than in the service of the ship." In a motion for leave to file a brief *amicus curiae*, the United States Lines Company has urged that *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, should not be extended beyond its facts to permit recovery for injuries incurred while the seaman was ashore beyond the premises where the vessel was docked. Because we believe that recovery in the present case is in any event precluded by the affirmative misconduct of the petitioner, we have not thought it necessary to take a position on the question whether the injury here occurred in the service of the ship.

its decision was not affected by the terms of Article 2 of the Convention.

The Government believes that paragraph 1 of Article 2 of the Convention is self-executing. Accordingly, the controverted questions are as follows:

1. Whether the exceptions permitted by paragraph 2 of Article 2 are operative, in the absence of an implementing statute, by virtue of the general maritime law.

2. Whether petitioner's misconduct was such "wilful act, default or misbehavior" as to bar recovery of maintenance and cure.

TREATY INVOLVED

The Shipowners' Liability Convention (Draft Convention 55 of the International Labor Organization), 54 Stat. 1693, is set forth in the English text in the Appendix, pp. 84–96. In pertinent part, the Convention provides as follows:

> ARTICLE 2. 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.
>
> 2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured, or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

STATEMENT

This suit was instituted by petitioner in the District Court for the Southern District of New York by libel filed on March 2, 194[illegible] (R. 1, 3–6). Petitioner sought to recover maintenance and cure from the United States, as owner, and from American South African Line, Inc., the Government's general agent or ship's husband, as operator, of the steamship *Anna Howard Shaw*.[2] Answers were filed by both named respondents (R. 7–11, 13–15), both of which raised the defense, *inter alia*, that the claim to maintenance and cure was barred by petitioner's gross negligence or his deliberate act of indiscretion (R. 9, 14).

The case was tried on October 29 and October 30, 1947 (R. 31–90). Briefly, the pertinent facts, as found by the district judge, are as follows (R. 101–102):[3] Petitioner, a messman aboard the

[2] The title of the libel indicated that it was an action for "wages, overtime and maintenance" (R. 3). The claim for wages and overtime was abandoned during the trial (R. 52) and the case was maintained solely as one for maintenance and cure.

[3] The facts found by the district court are derived from the testimony of petitioner at the trial. As in most cases of this type, such testimony is the only direct evidence available to

Anna Howard Shaw, went ashore on leave while the vessel was in the Bay of Naples on October 30, 1944. Together with two other members of the crew, he spent some time sightseeing in the water-front town of Bagnoli, stopping at various stores and drinking a bottle of wine. After a time, they entered a dance hall and stayed about an hour and a half, most of which time, according to petitioner, was spent in dancing. Petitioner entered an adjoining room in the dance hall, overlooking the sea, which had French doors reaching to the level of the floor. Outside of the room petitioner observed a wholly unprotected ledge which extended out from the building some two or three feet. Petitioner went out on this ledge to a position where the toes of his shoes were about six inches from the edge and leaned over, at the same time taking hold of a half-inch rod which was apparently affixed to the building to his right. As he grasped the rod and leaned over the edge, the rod came off and petitioner lost his balance and fell, fracturing his right lower leg.[4]

---

the shipowner. In this connection, it may be noted that petitioner gave conflicting accounts of the nature of the accident for other purposes. For example, the Stapleton Hospital history indicates a statement by petitioner that he leaned against a guard rail which broke (R. 94a). Petitioner's administrative claim states that the railing around the balcony at the dance hall broke (R. 93). The deck log of the vessel, based on petitioner's statement, indicated that petitioner fell off a cliff (R. 86).

[4] Petitioner was immediately hospitalized in Naples, where his leg was set and put in a cast (R. 40–41). He was subse-

The district court awarded maintenance to petitioner in the amount of $644.16 [5] and entered a decree for that sum against the general agent, American South African Line; Inc. (R. 109). The libel was dismissed as to the United States for want of proper venue, in that the ship was not present in the district when the libel was filed (R. 99). The general agent, American South African Line, Inc., was held answerable as the operator of the vessel under this Court's decision in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 (R. 99–101).[6]

On the merits, the district court held that petitioner was not precluded from claiming maintenance by the mere fact that he was ashore for his own recreational purposes (R. 103–107). It held further that petitioner was "less sober than he says he was, but * * * not so under the influence of liquor as to be barred from recovery" (R. 108).[7] Finally, it described his action in going on the ledge as a "perilous undertaking" and that

---

quently flown home and treated at the Jackson Memorial Hospital in Miami, the Stapleton Marine Hospital at Staten Island and the Detroit Marine Hospital (R. 40–44, 91a–91b). The transportation as well as the hospitalization and care were, of course, without cost to petitioner.

[5] This amount apparently represents a daily allowance for periods December 21, 1944, to February 27, 1945, and May 29, 1945, to July 1, 1945 (R. 55).

[6] This holding was affirmed on rehearing (R. 115–116).

[7] The record of the Army hospital in Naples, made at the time of petitioner's entrance, indicated acute alcoholism (R. 73).

in leaning over the edge as "even more perilous" (R. 102). It recognized that petitioner took only a "casual glance" at the rod on the wall, which looked like a "lightning arrester or something of that type," (R. 102). Nevertheless the Court held that petitioner's conduct fell short of the recklessness which would, under general admiralty law serve to bar his claim (R. 108–109).

An appeal was taken by the general agent from the decree entered against it by the district court (R. 125).[8] Petitioner cross-appealed from the decree which dismissed the libel as against the United States (R. 132–133). During the pendency of the appeal, this Court handed down its decision in *Fink* v. *Shepard SS Co.*, 337 U. S. 810, and, accordingly, the decree against the general agent was reversed by agreement of the parties (R. 138). The dismissal of the libel as against the United States on the ground of improper venue was also reversed (R. 138–139), and the court below proceeded to consider the case on the merits as against the United States.

The doctrine of *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, was interpreted and applied as permitting recovery of maintenance and cure unless the seaman's injury resulted from his will-

[8] The general agent's brief urged three grounds for reversal: (1) that as general agent it was not liable for maintenance; (2) that a shipowner is not liable for maintenance where the seaman is injured while engaged in recreational activities; (3) that petitioner could not recover because injured as a result of his own gross negligence or indiscretion.

ful misbehavior or gross negligence (R. 139–140). After reviewing the facts, the court below concluded that petitioner's actions, in circumstances of danger, did not show "* * * even a minimal degree of regard for the consequences of his act" and, accordingly, found his claim to maintenance and cure barred by his own gross negligence (R. 139–141).

A petition for rehearing was filed which raised for the first time the contention that the liability of the United States for maintenance and cure was absolute by virtue of Article 2 of the Shipowners' Liability Convention, 1936, *supra*, pp. 3–4 (R. 151–153). The substance of petitioner's contention was that clause 1 of Article 2, placing liability for maintenance and cure on the shipowner, was in effect and binding, but that clause 2 of Article 2, permitting exceptions was not self-executing and, accordingly, not in effect (R. 152). Upon consideration of the petition for rehearing, the court below held, one judge dissenting, that Article 2, if self-executing, was in effect as a unit and required no legislation to make it operative (R. 154–157).

SUMMARY OF ARGUMENT

I

A. The Government is in accord with petitioner that Article 2, paragraph 1, of the Shipowners' Liability Convention is self-executing. Since the language of paragraph 1 provides a rule of deci-

sion which requires no implementing legislation, it has been uniformly construed by the executive departments as being fully in force.

B. We take issue, however, on the construction to be given paragraph 2. Petitioner asserts that the exceptions permitted by paragraph 2, which are declaratory of the general United States maritime law, can be made effective only by affirmative statutory enactment. We submit that this result was never intended. Basically, it is inconsistent with the general design of International Labor Conventions of leaving the method of application to national discretion. Moreover, it is refuted by the historical background of the Convention and its construction by the executive departments.

1. As a Memorandum prepared by the International Labor Office points out, "from an international point of view, what is essential is that the provisions of a Convention should be fully applied; in regard to the manner of application, both the Constitution of the Organisation and the terms of the individual Conventions deliberately leave a wide measure of discretion to each country." Consistent with this general purpose it has been commonly understood that after ratification of a Convention statutory implementation is not necessary to make its terms effective if existing legal principles or rules conform to the requirements of the Convention. Similarly, the international obligations of this Government are satisfied if the provisions of a Convention are

made effective as self-executing by virtue of our Constitution. Analysis of the Shipowners' Liability Convention demonstrates that, in accordance with the general design of International Labor Conventions, the details of the nature and the extent of the liability of shipowners are left to national discretion and that existing law remains unrepealed. This conclusion is strongly buttressed by the broad and comprehensive sweep of the expression "national laws and regulations." As the Memorandum of the International Labor Office notes, this expression has "unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion. * * * From an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law."

2. The historical background of the Convention reveals no intention to repeal existing legal principles which absolve the shipowner of liability where the seaman is at fault. Examination of the pertinent reports and records of the Convention discloses plainly that its general purpose is to achieve a certain measure of standardization internationally through an average formulation of

existing national law. Specifically, it is manifest from these reports and records that the exception based on the notion of fault represents an average solution in its formulation, which was deliberately introduced into the Convention because of the then existing state of national law.

3. Moreover, the construction of paragraph 2 for which petitioner here contends is in conflict with the construction given paragraph 2 by the executive departments contemporaneously with, and subsequent to, ratification of the Convention. The expressions of executive opinion in 1939 upon which petitioner relies can be reconciled with previous and subsequent executive expressions and actions only if read as having been uttered out of excess of caution and out of a desire to codify the maritime law in the field covered by the Convention in so far as the terms of the Convention left room for national discretion. But even if the 1939 statements are to be construed as petitioner construes them, the most that can be said is that the executive construction of paragraph 2 has been inconsistent. In such circumstances, this Court should adopt that construction which best harmonizes with the text and purposes of the Convention and with the understanding of it expressed by the I. L. O. itself.

II

A. The court below denied recovery of maintenance and cure on the ground that petitioner's

conduct was in reckless disregard of his own safety. The standard thus applied is entirely in accord with this Court's pronouncements in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, and the leading decisions in this field. Moreover, this standard is synonymous with the words "wilful act, default or misbehavior" used in paragraph 2. On their face, these words comprehend within their scope a deliberate act of indiscretion signified by a reckless disregard of safety; and examination of the pertinent reports and records of the Convention bears out this construction.

B. The record fully supports the unanimous judgment of the court below that petitioner did not "show even a minimal degree of regard for the consequences of his act." According to petitioner's own testimony, petitioner, although fully aware of the fact that he had been drinking, went out upon an unprotected ledge, 2 to 3 feet wide, which had a sheer drop of 30 to 35 feet. He stood there, about six inches from the edge of the ledge, for about three to five minutes, and then, although certainly cognizant of the fact that a fall would cause serious bodily injury, leaned over the edge and "somehow or other * * * took hold of this rod," which was like a "lightning arrester," without giving it more than just a "casual glance." We submit that such misconduct on petitioner's part falls well within the established meaning of conduct in reckless disregard of safety.

ARGUMENT

PRELIMINARY STATEMENT

In this proceeding, petitioner, a merchant seaman employed by the United States, seeks maintenance and cure for injuries received while on authorized shore leave in Italy in 1944. The court below denied recovery under the general maritime law because of petitioner's misconduct, and held that its decision is not affected by the terms of the Shipowners' Liability Convention (International Labor Convention 55).

Petitioner here asserts that the decision below is in error in two respects. First, he contends that paragraph 1 of Article 2 of the Convention is self-executing, and that a shipowner's duty thereunder to provide maintenance and cure is absolute in the absence of enactment of an implementing statute putting into force the exceptions permitted by paragraph 2 of Article 2. Secondly, and alternatively, petitioner contends that if paragraph 2 is operative, his conduct at the time he incurred the injury was not such as would defeat his claim to maintenance and cure under that paragraph or under the general maritime law.

It has apparently been assumed by this Court, without discussion of the problem, that the Convention is to some extent self-operative. See *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 42; *De Zon* v. *American President Lines*, 318 U. S. 660, 667, n. 3; *Farrell* v. *United States*, 336 U. S.

511, 517. The precise question here involved, however, was expressly left open by this Court's opinion in *Aguilar* v. *Standard Oil Co.* and *Waterman Steamship Corp* v. *Jones,* 318 U. S. 724. The issue in those cases was whether a shipowner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured, without any misconduct on his part (p. 726), while traversing the only available route between the moored ship and a public street. In the *Aguilar* case, the injury occurred prior to the effective date of the Shipowners' Liability Convention; in the *Jones* case, the injury occurred subsequent to the effective date of the Convention. A majority of the Court held in the *Aguilar* case that, on the facts presented, the seaman was in the service of the ship at the time of the injury, and the shipowner, therefore, was liable for maintenance and cure under the principles of general maritime law. Accordingly, since the Convention, by its terms, effected no change in that liability in the absence of misconduct, the Court found it unnecessary, in so far as Jones' claim was concerned, to consider the possible application of the Convention (p. 737). In this connection, it should be noted that neither party in the *Jones* case raised or briefed the question of the Convention's effect upon the disposition of Jones' claim to maintenance and cure.

In a short memorandum opinion (p. 738), Mr. Chief Justice Stone dissented from the majority decision in the *Aguilar* case, taking the view that liability does not exist under general maritime law where a seaman leaves the ship on personal business. He concurred in the result in the *Jones* case "* * * on the ground that the recovery was authorized by the Shipowners' Liability Convention, 54 Stat. 1695, which became effective before the date of respondent's injury. He [was] of opinion that Article 2, Clause 1 of the treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect. * * *."

Taking cognizance of this observation by the Chief Justice, a majority of the court below (Judges Swan and L. Hand) declared (R. 155–156):

> If it be assumed that Clause 1 of Article 2 is self-executing, there would seem to be equal reason to make the same assumption as to Clause 2, unless the phrase "national laws or regulations" must be interpreted to exclude decisional law and refer only to legislation. It is true that Chief Justice Stone in the *Aguilar* case, *supra,* after stating that the first clause of Article 2 is self-executing went on to say "and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect." This bald

> statement of opinion does not disclose any reasons in support of it, and despite the high regard we have for any utterance of Chief Justice Stone, independent examination of the question constrains us respectfully to disagree. * * * Our study of the Convention leads us to the conclusion that if Clause 1 of Article 2 is self-executing so also is Clause 2. If, on the other hand, Clause 1 of Article 2 is not self-executing the Convention does not apply. Either construction of Clause 1 leads to the conclusion that our decision is not affected by the terms of the Convention. * * *

Judge Frank, dissenting, stated, on the other hand, that (R. 157) "* * * the construction given by my colleagues seems to me to be unnecessarily complicated and insufficiently sustained by persuasive reasons to justify a disregard for Chief Justice Stone's views. * * *."

In this brief, we propose to show that there are sound and persuasive reasons to justify the rejection by the majority below of Chief Justice Stone's views as to the necessity for implementing legislation with respect to paragraph 2 of Article 2 of the Convention. We agree with the Chief Justice that paragraph 1 of Article 2 is self-executing,[9] but, as we shall demonstrate in

[9] The defense of the proceedings below was handled by private counsel retained by the government agent. In protecting the interests of the agent, counsel argued in the court below, not only that the convention was merely declaratory

Part I of this brief, the language of the Convention, its historical background, and its construction by the executive departments of the Government [10] point to the conclusion that the exceptions permitted by paragraph 2 are presently operative by virtue of the general maritime law. We shall further show in Part II that petitioner's conduct at the time he sustained his injury was such as defeats his claim to maintenance and cure under the Convention and under the general maritime law.

---

of the preexisting American law, but also that paragraph 1 is not self-executing. The Solicitor General believes that the argument thus made as to the non-self-executing character of the convention was in error.

[10] It is a familiar principle that "in ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it." *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–295; *Cook* v. *United States*, 288 U. S. 102, 112; *Nielsen* v. *Johnson*, 279 U. S. 47, 52. Compare Article 19 (a) of the Draft Convention on the Law of Treaties prepared by the Research in International Law of the Harvard Law School, which states (29 Am. J. Int'l L. Supp. No. 4, pp. 937–971): "A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve."

See also Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549.

Before discussing these issues, however, we think it appropriate, in order that the historical background of the Convention may be seen in its proper context, to set forth briefly the nature of the International Labor Organization, the procedure by which International Labor Conventions are drafted and adopted, and the sequence of events leading to the Shipowners' Liability Convention.

1. *The International Labor Organization.*—(a) The establishment of the International Labor Organization (I. L. O.) was provided for in the treaties of peace negotiated at the end of World War I; its Constitution formed part XIII of the Treaty of Versailles of June 28, 1919, of the Treaty of St. Germain of September 10, 1919, of the Treaty of Trianon of June 4, 1920, and part XII of the Treaty of Neuilly of November 27, 1919.[11] Its purpose, as set forth in the preamble of the Constitution of the I. L. O., is to further the adoption of international regulations designed to achieve the extension of social security and welfare legislation.

Although Article 387 of the Constitution provided that "the original Members of the League

[11] This Constitution of the I. L. O. is reprinted in 30 Am. J. Int'l L. Supp. pp. 68–78. The origins of the I. L. O. are summarized in Dillon, *International Labor Conventions* (1942 ed.) pp. 1–11. A more detailed statement may be found in Shotwell (ed.), *The Origins of the International Labor Organization: The Paris Peace Conference—History and Documents* (2 Vol.) (1934).

of Nations shall be the original Members of this organization, and hereafter membership of the League of Nations shall carry with it membership of the said organization," the United States, without becoming a member of the League of Nations and without assuming any obligation under the Covenant of the League of Nations, became a member of the I. L. O. on August 20, 1934.[12]

---

[12] United States Treaties, Treaty Series, No. 874. See also 30 Am. J. Int'l L. Supp. pp. 67–85.

As of 1949, the membership of the I. L. O. comprised the following countries.

Afghanistan
Albania
Argentine Republic
Australia
Austria
Belgium
Burma
Bolivia
Brazil
Bulgaria
Canada
Ceylon
Chile
China
Colombia
Costa Rica
Cuba
Czechoslovakia
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Finland
France
Greece
Guatemala
Haiti
Hungary
Iceland
India
Iran
Iraq
Ireland
Italy
Liberia
Luxembourg
Mexico
Netherlands
New Zealand
Norway
Pakistan
Panama
Peru
Philippines
Poland
Portugal
Sweden
Switzerland

Upon the establishment of the United Nations, the Constitution of the I. L. O. was amended in 1946 [13] to make specific provision for relationship with the U. N. Pursuant to an agreement reached between the I. L. O. and the U. N., effective December 14, 1946, the U. N. recognized the I. L. O. as a "specialized agency" (in the technical meaning of the term as defined in Article 57 (2) of the U. N. Charter) "responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein." [14]

Syria	
Thailand	United States of America
Turkey	Uruguay
Union of South Africa	Venezuela
United Kingdom	Yugoslavia

See United States Department of State Publication No. 3655, International Organization and Conference Series I, 8, *International Organizations in which the United States Participates* (1949), pp. 231–232.

[13] The instrument of amendment became effective April 20, 1948. See United States Department of State Publication No. 2851, *United States Treaty Developments* (June 1949), June 28, 1919. T. S. 874, p. 3. The text of the Constitution, as amended, is contained in the *Constitution and Rules of the International Labor Organization, Conference Edition*, International Labor Office, May 1948.

[14] See, Fried, *Relations Between the United Nations and the International Labor Organization*, 41 Am. Pol. Sci. Rev. 963, 971. The text of the agreement is contained in the *Official Bulletin*, International Labor Office, November 15, 1946, p. 292, and in the *Constitution and Rules of the International Labor Organization, Conference Edition*, International Labor Office, May 1948, p. 63.

(b) The I. L. O. functions through three organs: The General Conference of representatives of the Members, the Governing Body, and the International Labor Office, which is controlled by the Governing Body.

The General Conference, which meets ordinarily once a year, is the policy making body. It is composed of four representatives of each of the Members, of whom two are Government delegates and two are delegates representing, respectively, the employers and the workers of each of the Members. Each delegate is entitled to vote individually on all matters which are considered by the Conference.

The Governing Body serves as the executive council of the Organization. It consists of thirty-two persons—eight representing the workers, eight representing the employers and sixteen representing Governments. Of the sixteen persons representing Governments, eight are appointed by Members of major industrial importance, and eight are appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the eight Members of chief industrial importance. Representatives of the employers and workers are elected respectively by the delegates of the employers and workers to the Conference. The period of office is three years.

The Governing Body meets four times a year, elects its own chairman and regulates its own

procedure. Among its functions are the calling of the Conference and the determination of the items for the agenda. In addition, it determines the time, place, and agenda of regional conferences and committees, and supervises the work of these bodies. It also supervises the work of the International Labor Office and appoints its Director-General.

The International Labor Office is the permanent secretariat of the Governing Body and the General Conference. The Office prepares material for the use of the Governing Body and its committees and for the General Conference. In addition, it collects and publishes current information on labor and social questions throughout the world.

2. *The Procedure By Which International Labor Conventions Are Adopted.*—The agenda for all meetings of the Conference is initially settled by the Governing Body,[15] and is transmitted to the Member Nations by the Director-General who acts as Secretary-General of the Conference. By a two-thirds vote of the delegates present at the Conference, items of the agenda selected by the Governing Body may be excluded from the agenda. In addition, the Conference, by

[15] The method of voting for placing items on the agenda is set forth in the Standing Orders of each International Labor Conference. See *e. g.*, *Constitution and Rules of the International Labor Conference, Conference Edition*, International Labor Office, May 1948, pp. 43–44.

two-thirds vote of the delegates present, may select subjects to be included in the agenda for the following meeting.

Conventions are adopted through either a "single-discussion" or a "double-discussion" procedure.[16] Under the "single-discussion" procedure, the International Labor Office communicates to each Member Government a summary report upon the question for discussion, containing a statement of the law and practice in the different countries (Grey Report), accompanied by a questionnaire drawn up with a view to the preparation of Conventions or Recommendations (Red Report).[17] On the basis of the replies received, the Office draws up a final report containing one or more Draft Conventions or Recommendations (Blue Report). This report is the basis for discussion at the Conference. Under the "double-discussion" procedure, the Office similarly prepares a preliminary report (Grey Report) containing a statement of the law and practice in the different countries and a list of proposed points for discussion. A preparatory discussion is then had at the Conference. If the Conference decides that the matter is suitable to form the

[16] See Articles 36–37 of the Standing Orders of the International Labor Conference, *id.* at pp. 44–47. See also Dillon, *op. cit. supra* at pp. 11–15.

[17] A Conference may result in a Convention or a Recommendation. A Recommendation differs from a Convention in that it entails no substantive international obligations or rights. See Article 19 (6) of the I. L. O. Constitution.

subject of Conventions or Recommendations, it adopts draft conclusions, and may decide either that the question shall be included in the agenda of the following session or ask the Governing Body to include the question in the agenda at a later session. Following the adoption of draft conclusions, the Office prepares a questionnaire (Red Report). From the replies received, the Office prepares a proposed Draft Convention or Recomendation which reflects the average point of view expressed. This report (Blue Report) is the basis for final discussion in the Conference.

The actual work at the Conference is done to a large extent by Conference Committees. The representation of the three groups in the Conference (Members, employers, and workers) is equally divided on the committees. Members of a committee may suggest amendments to the report, but a new report may not be proposed. The procedure in committee consists of proposals, and debates on these proposals, until an agreement is reached. In some instances, minority reports are filed. The conclusions reached by the committees are then presented to the Conference by their Reporters and are discussed first in general and then in detail. Frequently, amendments are proposed and voted on and a preliminary record vote taken. If, on a final discussion of a Draft Convention, a majority is procured, the provisional text is referred to the Drafting Committee. When this committee reports back to the Confer-

ence, a vote is taken on the rejection or adoption of the Convention. On this vote, a two-thirds majority is required.[18]

Following adoption by the Conference, two copies of the Convention are authenticated by the signatures of the President of the Conference and of the Director-General. One copy is deposited in the archives of the Office and the other with the Secretary-General of the United Nations. A certified copy is transmitted by the Director-General to each of the Members.

Each of the Members undertakes that it will, within the period of one year from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so, then at the earliest practicable moment and in no case later than eighteen months after the closing of the session, bring the Convention before the authority or authorities within whose competence the matter lies, for legislative or other action. If the Member obtains the consent of the authority or authorities within whose competence the matter lies, it communicates formal ratifiction of the Convention to the Director-General and is obligated to take such action as may be necessary to

[18] Should any Convention fail to secure the support of two-thirds of the votes cast by the delegates present, Members, although under no duty to submit the Convention to the appropriate authorities for approval, ratification and implementation have, of course, the right to agree to the Convention among themselves.

make effective the provisions of the Convention.[19] As soon as a certain number of ratifications (usually two) have been obtained, the draft becomes a Convention in the strict sense of the term but is binding only on the ratifying Members.[20]

3. *The Shipowners' Liability Convention.*[21]—(a) The "double-discussion procedure described above, pp. 23–25, was employed in the adoption of the Shipowners' Liability Convention. In accordance with the decision reached by the Governing Body at its Thirty-Fifth Session (Geneva, January 1927), the question of the protection of seamen in case of injury was placed on the agenda of the Thirteenth Session of the General Conference. In preparation for this session, the International Labor Office prepared a "Grey Report"

[19] See Article 19 of the I. L. O. Constitution.

[20] See 5 Hackworth, *Digest of International Law* (1943 ed.) pp. 30–31.

[21] To date, ninety-eight Draft Conventions have been adopted at sessions of the International Labor Conference. As of September 30, 1949, fifty-six have been ratified and come into force. See International Labour Conference (1949), *Conventions and Recommendations: 1919–1949*, p. iii. The United States has ratified five Conventions, all of which relate to maritime matters. They are as follows: No. 53, Officers' competency certificates (54 Stat. 1683); No. 54, Annual holidays with pay for seamen; No. 55, Shipowners liability (54 Stat. 1693); No. 57, Hours of work on board ship and manning; and No. 58, Minimum age for admission of children to employment at sea (revised) (54 Stat. 1705). Conventions 54 and 57 have not yet come into force. See United States Treaty Developments, *op. cit. supra* at pp. 5–8.

analyzing the national laws then prevailing in the member nations and suggested a number of points on which the Conference might deem it desirable for the Office to consult the member Governments.[22]

At the Thirteenth Session of the Conference (Geneva 1929), the proposed points for discussion submitted by the Office [23] were debated and some amendments adopted.[24] The Conference then adopted draft conclusions and placed the question on the agenda for a second discussion. Following the Conference, a questionnaire was prepared by the Office and forwarded to the Governments in November 1929 (Red Report).[25] On the basis of the replies received, the Office reported out a proposed Draft Convention (Blue Report).[26]

---

[22] See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen On Board Ship, First Discussion.*

[23] The proposed draft conclusions of the Office are set forth in International Labor Conference, *Proceedings, Thirteenth Session* (1929), p. 348 ff.

[24] *Id.*, at pp. 131–142, 348–381.

[25] It should be noted in this connection that, since the United States did not become a member of the I. L. O. until 1934, it did not participate in the Thirteenth Session of the Conference, nor did it receive a questionnaire. The "Grey Report" did, however, include the United States in its analysis of the existing law.

[26] See International Labor Conference (1931), *The Protection of Seamen In Case of Sickness, Including the Treatment of Seamen Injured On Board Ship, Second Discussion* (Report II). This "Blue Report" contains the questions asked as well as the replies thereto.

The second discussion of the question took place at the Twenty-First Session of the Conference in 1936. The draft Convention proposed by the Office was amended by the Conference in several respects and finally adopted by a vote of 70 to 14.[27]

(b) On August 19, 1937, the Draft Convention (No. 55) was transmitted to the United States Senate by the President. 81 Cong. Rec. 9347.[28] The Senate Committee on Foreign Relations, without holding hearings, reported the Convention out on May 2, 1938, with the recommendation that it be ratified, subject to certain understandings not here pertinent. Sen. Exec. Rept. 8, 75th Cong., 3d Sess.; 83 Cong. Rec. 6046. The Convention was consented to by the Senate without debate on June 13, 1938 (83 Cong. Rec. 9028–9030), and was ratified by the President on August 15, 1938. 54 Stat. 1693.

---

[27] See International Labor Conference, *Proceedings, Twenty-First Session* (1936). The report of the Committee on the protection of seamen in case of sickness or injury is found at pp. 247–258; the debates of the Conference are contained in pp. 72–84; and the final text of the Draft Convention appears at pp. 327–334. All four delegates from the United States voted for the adoption of the Convention (p. 171). The names of the United States delegates and advisers are set forth on p. 3.

[28] Accompanying the President's transmittal were reports from the interested Government Departments—State, Commerce, Labor, and the Maritime Commission—expressing their views. See Sen. Exec. Rept. 8, 75th Cong., 3d Sess., pp. 5–20. Sen. Exec. Rept. 8 also contains a report on the Twenty-First Session of the Conference by the United States delegates thereto (pp. 10–15).

On October 29, 1938, this country's ratification was registered with the Secretary-General of the League of Nations, in accordance with Article 405 (4) of the original I. L. O. Constitution. A prior ratification by Belgium was registered on November 4, 1938, and pursuant to Article 15 (2) of the Convention, which provides that it shall come into force twelve months after the date on which the ratifications of two members have been registered, the Convention became effective on October 29, 1939. It was so proclaimed by the President on that date. 54 Stat. 1693–1704. To date, the Convention has been ratified by five countries: Belgium, Bulgaria, France, Mexico, and the United States.[29]

(c) Following ratification, a bill was introduced on June 16, 1939, to implement the Convention. H. R. 6881, 76th Cong., 1st Sess., 84 Cong. Rec. 7392. The bill was drafted by an interdepartmental committee representing the Departments of State, Commerce, Justice, Labor, and Treasury, the Maritime Commission, Maritime Labor Board, Social Security Board and the United States Employee's Compensation Commission.[30] Hearings were held before the House Committee on Merchant Marine and Fisheries in July 1939,[31] and the

[29] See International Labor Conference, Thirty-Third Session (1950), Report III (Part I), *Summary Of Reports On Ratified Conventions*, p. 240.

[30] H. Rept. 1328, 76th Cong., 1st Sess., p. 49.

[31] Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 6726 and H. R. 6881, 76th Cong., 1st Sess.

bill was reported out favorably with amendments. H. Rept. 1328, 76th Cong., 1st Sess.; 84 Cong. Rec. 10129. It was passed without debate by the House of Representatives. 84 Cong. Rec. 10540. Hearings were then held before a subcommittee of the Senate Committee on Commerce in July 1940.[32] However, the Committee Print under consideration was not the bill as received from the House, but a bill revised by the subcommittee to incorporate provisions applying the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901–950) to seamen.[33] So revised, the bill was opposed by seamen's representatives;[34] and as a result of that opposition, the bill was tabled by the subcommittee.[35] A bill identical to H. R. 6881 as it had passed the House, in the 76th Congress, was reintroduced in the House on January 3, 1941. H. R. 557, 77th Cong., 1st Sess., 87 Cong. Rec. 15. No action was taken on it by the House Committee on Merchant Marine and Fish-

[32] Hearings before the Subcommittee of the Committee on Commerce, United States Senate, on H. R. 6881, 76th Cong., 3d Sess.

[33] *Id.* at pp. 1–8.

[34] *Id. passim.*

[35] Subsequently, on September 12, 1940, the Senate agreed to a Resolution referring the question of workmen's compensation for seamen to the interested Government agencies for investigation. S. Res. 299, 76th Cong., 3d Sess., 86 Cong. Rec. 12002. The agencies' report pursuant thereto was transmitted to the Senate on September 17, 1941, and referred to the Committee on Commerce. S. Doc. 113, 77th Cong., 1st Sess., 87 Cong. Rec. 7434. No further action was taken.

eries, and no further legislative action has been taken to implement the Convention.

I

ARTICLE 2 OF THE SHIPOWNERS' LIABILITY CONVENTION IS EFFECTIVE ALTHOUGH IMPLEMENTING LEGISLATION HAS NOT BEEN ENACTED

A. PARAGRAPH 1 OF ARTICLE 2 IS SELF-EXECUTING

At the outset, we wish to reiterate that petitioner and the Government are fully in accord on the proposition that Article 2, paragraph 1, of the Shipowners' Liability Convention is self-executing. The governing principle of construction is well-settled. "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." *Foster* v. *Neilson,* 2 Pet. 253, 314. "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases,* 112 U. S. 580, 598–599. See also *Dainese* v. *Hale,* 91 U. S. 13, 18; *United States* v. *Rauscher,* 119 U. S. 407, 418–419; *Valentine* v. *United States ex rel. Neidecker,* 299 U. S. 5, 10–11; *Bacardi Corp.* v. *Domenech,* 311 U. S. 150, 161.

Applying this principle to Article 2, paragraph 1, there can be no doubt that that provision is

self-executing. Plainly, no legislation is required to make effective the command of that paragraph that:

> The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement; * * *

In clear and concise language, paragraph 1 lays down a rule of law which determines the rights and duties of seamen and shipowners.[36] Legislation by Congress could do no more than enact its terms verbatim.

It is readily apparent, therefore, why this Court has, in prior cases which did not directly raise the question, assumed, without discussion, that the Convention is self-executing in part. See *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 42; *De Zon* v. *American President Lines*, 318 U. S. 660, 667, n. 3; *Farrell* v. *United States*, 336 U. S. 511, 517. See also the concurring opinion of Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones*, 318 U. S. 724, 738.

Similarly, the executive branch of the Government has proceeded on the belief that the Convention is self-operating in part. As we have already noted above, pp. 29–31, following ratification of the Convention on August 15, 1938, but

[36] The nature and extent of the liability are further defined by Articles 1 to 12. See *infra*, pp. 47–51.

prior to its effective date, a proposed bill to implement the Convention was submitted to Congress by the executive branch. H. R. 6881, 76th Cong., 1st sess. Explaining the desirability of implementing legislation, Secretary of State Hull stated in a letter accompanying the draft bill (H. Rept. 1328, 76th Cong., 1st sess., p. 6):

> Many of the provisions of the convention are considered to be self-executing, and there would appear to be no need to repeat verbatim the language of the convention in a statute to make it effective. Some of the articles of the convention, however, after stating the general rule, provide that national laws may make specified exceptions thereto. If this Government is to be excepted from certain obligations of the convention or alterations in our present practice, it is necessary to do so affirmatively by statute.

As drafted, H. R. 6881 did not "repeat verbatim the language of the Convention": In particular, it contained no language enacting into statutory law the provisions of paragraph 1 of Article 2 of the Convention (*id.* at pp. 38–39). Justifying this omission, Secretary of State Hull observed that "Paragraph 1 of article 2 of the convention was not incorporated in the bill because of the belief (1) that it is self-executing in that it establishes liability, although no definite amount is provided; and (2) that it will not be

held by the courts to conflict with present law in this country." (*Id.* at p. 6).

This construction of the Convention embodied in H. R. 6881 reflected the views of an interdepartmental committee, consisting of representatives of the Departments of State, Commerce, Justice, Labor, and Treasury, the Maritime Commission, the Maritime Labor Board, the Social Security Board, and the United States Employee's Compensation Commission, which drafted the bill (*id.* at 49). In their comments on the bill, the Secretary of Labor, and the Chairman of the Maritime Commission likewise stated that certain provisions of the Convention were deemed to be self-executing. (*Id.* at pp. 31–32, 48–49.)

It should be noted in this connection that the House Committee on Merchant Marine and Fisheries, in its report on H. R. 6881, declared that it would not "* * * undertake to say that the convention or any part thereof is self-executing. * * *" and that it would not "* * * concede that any part of the draft convention is self-executing." (*Id.* at pp. 2, 3, 4.) Although the House Committee thus expressed no views on the question, it recognized that the Convention might be effective in part without implementing legislation and recommended enactment of the bill "* * * to the end that the extent of the obligations may be certain and fixed." (*Id.* at p. 4.) As already indicated above, pp. 29–

31, the bill failed of enactment for reasons not here pertinent.

Following submission of the proposed bill to Congress, the President, on October 29, 1939, proclaimed the Convention to be in force (54 Stat. 1693–1704). The proclamation, in accord with the executive construction of the Convention, declared the Convention to be self-executing in part. It states that the President has (54 Stat. 1704):

> * * * caused the said convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled in good faith by the United States of America and the citizens thereof, on and from October 29, 1939, subject to the understandings above recited and to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on part of the United States of America. * * *

Since 1939, the executive departments have consistently maintained the position that the Convention is self-executing in part. In *Farrell* v. *United States,* 336 U. S. 511, which involved the question whether a seaman who has already received the maximum cure that medical and surgical aid may accomplish is entitled to receive maintenance and cure indefinitely, the Government relied, in part, upon Article 4, paragraph 1, of the Convention and contended that it is self-

executing. (See Brief for the United States, p. 18, n. 8, in No. 267, October Term, 1948.) This Court's acceptance of the Government's position as to Article 4 (336 U. S. 511, 517, 524, n. 4) is, we believe, significant in interpreting Article 2, paragraph 1. Article 4, paragraph 1, provides that:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

Since this provision merely defines the extent of the liability which is imposed by Article 2, paragraph 1, it is obvious that if Article 4, paragraph 1, is self-executing, Article 2, paragraph 1, must also be self-executing.

This construction has further been manifested in the annual reports made by the United States to the International Labor Office on the measures which it has taken to give effect to the provisions of the Convention.[37] Although noting that this Court has never finally determined the point, the reports are made on the assumption that the Con-

[37] Article 22 of the Constitution of the I. L. O. provides as follows:

"Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

vention is, in fact, self-executing in part.[38] Indeed, a contrary position would constitute an admission by this Government that it has been in default since 1939 on its obligation under Article 19 (5) of the Constitution of the I. L. O. to "* * * take such action as may be necessary to make effective the provisions of such Convention; * * *," for no steps have been taken subsequent to the failure of enactment of H. R. 6881 to procure implementing legislation.

We submit, therefore, in view of the fact that Article 2, paragraph 1, plainly creates a rule of decision which requires no implementing legislation and in the light of executive construction which is entitled to great weight,[39] there can be no question that Article 2, paragraph 1, is self-executing.[40]

---

[38] See *e. g.*, *passim*, the report for the period July 1, 1949, to June 30, 1950, which is reprinted in the Appendix, pp. 115–137. These annual reports are prepared by the Department of Labor in consultation with the Government departments and agencies concerned. Copies are circulated annually to the United States Chamber of Commerce, the National Association of Manufacturers and the American Federation of Labor in accordance with Article 23 of the Constitution of the I. L. O. A copy of the Form approved by the Governing Body of the I. L. O. for use in drafting reports appears in the Appendix, pp. 103–114.

[39] Cf. *Factor* v. *Laubenheimer*, 290 U. S. 276, 295–298; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Charlton* v. *Kelly*, 229 U. S. 447, 468.

[40] Although the issue of whether a treaty, or a part thereof, is self-operative is a matter of municipal, not international, law, it is pertinent to observe that the Constitution of the I. L. O. and the terms of the individual Conventions permit,

B. THE EXCEPTIONS PERMITTED BY PARAGRAPH 2 ARE OPERATIVE BY VIRTUE OF THE GENERAL MARITIME LAW

Although we believe that the judicial and executive construction of the Convention to which we have adverted compel the conclusion that paragraph 1 of Article 2 is self-executing, it by no means follows that paragraph 2 of Article 2 is inoperative in the absence of an implementing statute. Petitioner refers in this connection to the concurring opinion of Mr. Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones, supra,* and to the construction supposedly given to paragraph 2 by the executive departments in connection with H. R. 6881. As the majority opinion of the court below pointed out, the three sentence memorandum of Mr. Chief Justice Stone contains no discussion of the text or history of the Convention but rests solely on the comments of Secretary of State Hull quoted in H. Rept. 1328, 76th Cong., 1st sess. (*supra,* p. 33). As we shall show, *infra,* pp. 60–66, petitioner's reliance on Secretary Hull's statement is misplaced. Moreover, there are sound and persuasive reasons, which find support in the general design of International Labor Conventions, in the aims of the Shipowners' Liability Convention, and its historical background, sustaining the interpretation

---

and indeed contemplate, that Conventions may be made effective as self-executory under the constitution or general law of the country concerned. See memorandum of the Director-General of the International Labor Office, Appendix, pp. 98–102.

placed by a majority of the court below on paragraph 2.

As the majority opinion points out (R. 155–156), "when the Convention was proclaimed to be effective, the existing maritime law of the United States recognized not only the shipowner's duty to pay maintenance and cure but also exceptions to that duty in case the seaman's injury or sickness was due to his own 'wilful act, default or misbehavior' or in case he 'intentionally concealed' sickness or infirmity existing when he signed the ship's articles." See *Aguilar* v. *Standard Oil Co., supra; Miller* v. *Lykes Bros.—Ripley S. S. Co. Inc.*, 98 F. 2d 185 (C. A. 5), certiorari denied, 305 U. S. 641. Thus, Article 2 of the Convention is simply declaratory of our general maritime law. Paragraph 1 recognizes the traditional liability of a shipowner for maintenance and cure and defines the period during which that liability may arise, and paragraph 2 specifies only the exceptions which the courts in this country have long permitted.[41] Similarly, the "Grey Report" discloses that Article 2 is declaratory of the law of other members of the I. L. O. as well. See International Labor Conference, Thirteenth Ses-

[41] See *Jordine* v. *Walling* (C. A. 3), *infra*, note 54, p. 62. Likewise, Article 4, paragraph 1, which imposes liability for maintenance and cure until the seaman has been cured or the sickness or incapacity has been declared of a permanent character, is merely declaratory of the general maritime law. See *Farrell* v. *United States*, 336 U. S. 511, 517, 524.

sion (Geneva 1929), *The Protection of Seamen In Case of Sickness, Including the Treatment of Seamen Injured On Board Ship, First Discussion,* pp. 37–45. If petitioner be correct in his contention that paragraph 2 is inoperative, it would mean that the International Labor Conference which adopted the Convention intended that part of the existing law was to continue and part was to be repealed, no matter how long the repealed part had been the settled policy of the individual nation; and that to reestablish that policy the nation must take affirmative action by adopting a new statute or regulation. We submit that this result was never intended. It is basically inconsistent with the general design of International Labor Conventions of leaving the method of application of the principles adopted to national discretion. Moreover, it is refuted by the historical background of the Convention and the construction which has been accorded the Convention by this Government.

1. *International Labor Conventions are Designed to Leave Room for National Discretion as to the Manner in which they are to be Applied and made Effective.*—Apart from the fact that the narrow construction of the expression "national laws or regulations" for which petitioner here contends finds no support in the historical background of the Convention, we think it significant that a restrictive reading of those words would defeat the flexibility of application which was in-

tended to be available to the member nations. On this point, an advisory opinion of the International Labor Office, given in reply to an inquiry of the Solicitor General, is illuminating.[42] As to the meaning of "national laws or regulations," the Office observes that (Appendix, pp. 101–102):[43]

> * * * No record has been found of any case in which it has been necessary for the International Labour Organisation to express an opinion on the question whether

---

[42] The letter of Solicitor General, dated October 27, 1950, after setting forth the provisions of Article 2, makes the following inquiry (Appendix, pp. 97–98):

"* * * We would appreciate being advised whether the International Labor Office considers these clauses to be self-executing or whether implementing legislation is required to give them effect. In particular, we are interested in ascertaining whether the International Labor Office construes the language 'national laws or regulations' as having reference solely to statutes or whether that language includes, as well, the principles of general maritime law enunciated and enforced by the courts. In this connection, your attention is called to the authentic French text which employs the term 'legislation nationale' * * *."

[43] It should be noted that the International Labor Office has no express authority under the Constitution of the I. L. O. to interpret the provisions of a Convention, such authority being reserved to the International Court of Justice (Art. 31, 37). But as a practical matter, such interpretations by the Office have been sanctioned by the I. L. O. See Dillon, *op. cit. supra* at pp. 15–16, 135–149. The Office's memorandum states that the observations therein made may "be of assistance in evaluating the view which the International Labour Conference, to which, under the Constitution of the Organisation, reports concerning the application of Conventions by Members which have ratified them are furnished each year, would be likely to take of the questions raised by the present case."

the term "national laws or regulations" which is frequently included in International Labour Conventions refers solely to statutes or can be regarded as also including the principles of general maritime law. The expression has, however, unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion and it would appear to be consistent with this general purpose to interpret the provision as allowing each party to the Convention to make the exceptions provided for either by specific enactment or by the application of some existing legal principle or rule. The term "national laws or regulations", without explicitly stating this conception, would not appear to be inconsistent with it, and the French term "*législation nationale*" is, if anything, of a more general and comprehensive character and includes not merely legislation in the narrowest technical sense, but other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law. It is, of course, for the courts of each country to decide what effect the incorporation of the terms of the Convention in national law as the direct result of ratification, by specific statutory enactment, or otherwise, may have had, but *from an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of*

Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law. [Emphasis added.] "

* * * * *

As this opinion reveals, International Labor Conventions are designed so as to leave room for national discretion. Since it was common knowledge that the various member nations have different systems of law and different methods

" As this opinion points out, the question whether paragraph 2 is self-executing is, analytically, a question of municipal, not international, law. It is a question, however, which must in many instances be resolved by reference to international sources and standards. If a treaty prescribes a rule by which individual rights may be judicially determined, our Constitution makes that rule a rule of decision (Article VI, Clause 2; see cases cited *supra*, p. 31). But whether the terms of the treaty lay down such a rule, or merely import an international obligation of the sovereign contracting parties to take such action as may be municipally necessary to effect the object to be accomplished, is a question which turns in major part on the language of the treaty and the intention of the contracting nations. Cf. *Foster* v. *Neilson*, 2 Pet. 253, 314–315. And this is particularly true where the question at issue concerns the intention of the treaty to abrogate an existing settled rule of domestic law. Accordingly, in construing the language of a treaty, it would seem at least equally relevant to inquire into the definition which may have been given to the language as a matter of international law or usage as into the meaning which is domestically ascribed to those words. Such an inquiry is particularly pertinent where, as here, the term "national laws or regulations" has been frequently employed in International Labor Conventions as a phrase of art.

of enforcement, it was scarcely to be expected that the rights and duties formulated in the various Conventions would be applied and enforced uniformly under one form of legal command. The history of the I. L. O. is barren of any information which might suggest that the I. L. O. was concerned with the form of the measures taken by the individual nations to make effective the terms of the Convention to which they were parties. The provisions of the Constitution of the I. L. O. make it clear that the I. L. O. is interested primarily in insuring that the terms of the Convention are made effective.[45]

Consistent with this general purpose, it has been commonly understood that legislation need not be enacted after the ratification of a Convention to make its terms effective if existing legal principles or rules conform to the requirements of the Convention. Thus, in several instances, other nations have found it unnecessary to do more than enact supplementary legislation or to issue supplementary administrative decrees or regulations after ratification of Conventions. In one case, the international obligations arising from ratification were deemed fully met by existing social legislation. See Dillon, *op. cit. supra* at pp. 167--171.

Similarly, the international obligations of this Government are satisfied if the provisions of a Convention are made effective as self-executing

[45] See Articles 22, 23, 26, 29, 33, 37.

by virtue of our Constitution. In this respect, the International Labor Office advises (Appendix, pp. 100–101):

> 3. * * * As the extent to which the provisions of an international Convention are self-executory differs considerably under the constitutional law of different countries, no uniformity in the matter has been, or is likely to be, practicable. The International Labour Organisation has been concerned to satisfy itself that, in cases in which no legislation which clearly implements the provisions of a Convention has been enacted, the Convention is effectively self-executory under the constitution or general law of the country concerned * * *. Subject to their being satisfied on this point, the compefent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and its existing law.
>
> 4. From an international point of view, what is essential is that the provisions of a Convention should be fully applied; in regard to the manner of application, both the Constitution of the Organisation and the terms of the individual Conventions deliberately leave a wide measure of discretion to each country; it has frequently been

> pointed out that so many of the Conventions require detailed national regulations, administrative arrangements or provisions for inspection, penalties and other means of enforcement, that some legislation will, in most cases, be necessary to make the provisions of a Convention effective; but the criterion is solely whether or not the provisions of a Convention *can* be made fully effective on a self-executory basis.

Recognizing that the several Governments employ different methods to apply and enforce the provisions of International Labor Conventions, the Governing Body has approved Forms for Annual Reports which are specifically designed to elucidate this point. The standard question, asked as to all Conventions,[46] is as follows:[47]

> Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, *etc.*, to the International Labour Office with this report.
>
> Where, notwithstanding the obligations resulting from the act of ratification, national law is not already in complete harmony with the provisions of the Convention, please indicate (a) to what extent

[46] See International Labour Conference, Thirty-third Session (Geneva, 1950), Report III (Part IV), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, p. 12.

[47] See *e. g.*, Question I of the Form for Annual Reports on Convention 55, Appendix, p. 104.

> the ratification has modified previously existing law, and (b) what steps have been taken to ensure the observance of the provisions of the Convention. [Emphasis added.]

Drafted to elicit information as to whether the terms of the Convention are being applied, this question clearly indicates that the manner of application is regarded as dependent upon national judgment.

Examination of the provisions of the Shipowners' Liability Convention demonstrates the correctness of the foregoing observations. By its terms, the Convention discloses that the details of the nature and extent of the liability of shipowners are left to national discretion and that existing law, whether statutory or decisional, remains unrepealed.

The provisions of the Convention here pertinent are contained in Articles 1 through 12, which define the persons covered, the risks covered, the benefits granted, and which provide for the settlement of disputes. With reference to the scope of the Convention, Article 1 declares generally that it applies to "all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation." It further provides, however, that national laws or regulations may except persons employed on board vessels of certain enumerated classifications, persons employed on board by an employer other

than the shipowner, longshoremen, pilots, and members of the shipowner's family.

As to the risks covered, Article 2 provides generally that the shipowner shall be liable for sickness and injury occurring during the period covered by the shipping articles and for death resulting from such sickness or injury. Here again, it is further provided that national laws or regulations may make exceptions in respect of injury not incurred in the service of the ship; injury or sickness due to the wilful act, default or misbehavior of the seaman; sickness or infirmity intentionally concealed when the shipping articles are signed; and sickness, or death directly attributable to sickness, if the seamen refused to be medically examined at the time of the engagement.

The benefits granted comprise maintenance and cure, payment of wages, repatriation expenses, burial expenses, and the safeguarding of property left on board by sick, injured or deceased seamen. As to maintenance and cure, Article 3 states generally that the seaman is entitled to medical treatment, to be supplied proper and sufficient medicines and therapeutical applicances, and board and lodging. It does not, however, define the cost of board and lodging.[48] The duration of

[48] In the United States, the cost of the seaman's maintenance is fixed by contract between the shipowners and the maritime unions. As of November 1949, the sum was fixed at $6 per day. See 4 National Association of Claimants' Compensation Attorneys Law Journal 232.

the shipowner's liability for maintenance and cure is declared by Article 4 to extend to that time when the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character, but national laws or regulations may limit such liability to a period not less than sixteen weeks from the day of the injury or the commencement of the sickness. Article 4 further states that if the vessel is registered in a territory which has a workmen's compensation or sickness insurance system, national laws or regulations may provide that the liability of the shipowner shall cease at the time the seaman becomes entitled to benefits under the scheme. In addition, Article 10 exempts the shipowner from any liability under Article 4 insofar as it is assumed by the public authorities.

As to wages, Article 5 imposes liability for the payment of full wages so long as the sick or injured seaman remains on board, and, if the seaman has dependents, for the payment of wages in whole or in part, as prescribed by national laws or regulations, from the time he is landed until he has been cured or the sickness or incapacity is declared permanent. In addition, national laws or regulations may limit this liability, as to seamen no longer on board, to a period not less than sixteen weeks from the day of the injury or the commencement of the sickness. Both Articles 4 and 5 further provide that the liability to pay

wages may be terminated by national laws or regulations when the seaman becomes entitled to cash benefits under a compulsory insurance or compensation scheme, if such is in force.

Article 6 makes the shipowner liable for the expenses of repatriating every sick or injured seaman who is landed during the voyage because of sickness or injury, and designates the port to which he is to be returned. Article 10, however, provides that the shipowner may be exempted from this liability insofar as it is assumed by the public authorities.

Article 7 provides that the shipowner shall be liable to defray burial expenses in case of death occuring on board, or in case of death occurring on shore if at the time of death the deceased was entitled to maintenance and cure. Liability under Article 7 is thus predicated upon the existence of liability under Article 2, which in turn depends upon the pertinent national laws or regulations. Article 7 further states that national laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefits are payable in respect of the deceased under laws or regulations relating to social insurance or workmen's compensation. In addition, as to this liability also, Article 10 provides that the shipowner may be exempted insofar as such liability is assumed by the public authorities.

Finally, rounding out the foregoing grants of benefits, Article 8 declares that national laws or regulations shall require the shipowner to take measures for safeguarding property left on board by sick, injured or deceased seamen.

To implement these benefits, Article 9 states that national laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes arising under the Convention; Article 11 announces that the Convention and national laws or regulations relating to benefits under the Convention shall be interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race; and Article 12 provides that "Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided for by this Convention." [49]

These provisions of the Convention speak for themselves; the Convention merely lays down fundamental principles and leaves the details of their application to national discretion.[50] More-

[49] The principle of construction thus provided by Article 12 is also set forth in Article 19 (8) of the Constitution of the I. L. O.

[50] In this connection, it is to be noted that several of the member nations stated, in response to the questionnaire circulated by the International Labor Office in 1929, that they supported the advisability of a Convention in this field if the Convention were to be drafted so as to allow sufficient margin for national discretion. See International Labor Conference

over, it is evident from Articles 4, 5, 7, and 12 that existing statutory and decisional law remains unrepealed. In the language of the majority opinion below (R. 156):

> * * * Clause 3 of Article 4 [and paragraphs 3 and 2 of Articles 5 and 7 respectively] provides that if there is "in force" in the territory in which the vessel is registered, "a scheme applying to seamen of compulsory sickness insurance," etc., such "scheme" will modify the general rule of liability declared by paragraph 1 of Article[s] 4 [5, and 7]. In other words, it does not require legislation to make effective exceptions to the general rule if a "scheme" is already "in force." It is true that the language of Clause 3 of Article 4—"national laws or regulations may provide"—is not precisely the same as in Clause 2 of Article 2, "national laws or regulations may make exceptions in respect of." But in substance we think it is the same. Article 12 also indicates that not all existing decisional law is to be repealed. * * *

The conclusion drawn by the majority below from its analysis of the terms of the Convention that paragraph 2 of Article 2 permits exceptions to be made effective by virtue of existing decisional law is strongly buttressed by the broad

---

(Geneva 1931), *The Protection of Seamen in case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), pp. 5–8.

and comprehensive sweep of the expression "national laws or regulations."

Comparison of the English and French texts of the Convention is instructive on this point.[51] The provision that "national laws or regulations may make exceptions" appears in the French text as "la législation nationale peut prévoir des exceptions." "Législation nationale" includes, as the International Labor Office points out (*supra*, pp. 41–43), "* * * not merely legislation in the narrowest technical sense, but other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law."[52] Similarly, in

[51] Article 20 of the Convention provides that the French and English texts shall both be authentic (see Appendix, p. 94).

[52] "Législation [syon] n. f. (du lat. *lex, legis*, loi et *latus*, porté). Droit de faire les lois. Corps du lois d'un pays: *la législation francais á été profondément remaniee apres la Révolution.* Science des lois: *cours de legislation.* Ensemble des lois qui régissent une matière: *la législation des accidents de travail.*" See 2 Nouveau Larousse Universel (1949 ed.) p. 36.

That the choice of the word "législation" was a deliberate one, evidencing an intention to permit the full exercise of national discretion as to the manner in which exceptions can be made, becomes apparent when Article 2 is compared with Article 12. Whereas the English text of Article 12 declares that "Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions * * *," the French text reads "Rien dans la présente convention n'affecte toute loi, toute sentence, toute coutume ou tout accord * * *." The use of the word "loi" in this context signifies, we believe,

Anglo-American jurisprudence, "law" is a generic term comprising the aggregate of those rules and principles which the governing power in an organized jural society recognizes as those which it will enforce or sanction, and according to which it will regulate, limit or protect the conduct of its members. Black's Law Dictionary (3d ed. 1933) p. 1074. It encompasses the common law, equity law, admiralty law, and customary law as well as the statutory law. Surely if the phrase "the laws of the several states" as used in the first Judiciary Act is broad enough to include common law decisions (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64), there is no textual necessity for a narrower reading of the phrase "national laws or regulations" in the Convention. In the absence of a modifying adjective, therefore, it would appear that the word "laws" may properly be equated with the French word "législation." Since the English and French texts "* * * can, without violence, be made to agree, that construction which establishes this conformity ought to prevail." *United States* v. *Percheman,* 7 Pet. 51, 88; cf. *United States* v. *Arredondo,* 6 Pet. 691, 737–738; 29 Am. J. Int'l L. Supp. No. 4, pp. 971–973.

---

that the use of the broader word "législation" in Article 2 was intentional and meaningful. Although the English text of Articles 2 and 12 does not clearly convey this distinction, it is consistent with it. See also Article 4, paragraph 3 (b), Article 5, paragraph 3 (b).

That the expression "national laws or regulations" is as broad and sweeping as the French text reveals it to be is further shown by the interpretation given it by the International Labor Office. On this score, the "Grey Report" is revealing. The purpose of that Report, as we have already noted, *supra,* pp. 23, 26–27, was to analyze the existing legal provisions relating to the obligations of shipowners toward sick or injured seamen so that it might be ascertained which aspects of the problem seemed capable of being the subject of a Convention. A reading of the Report discloses that the terms "national laws," "law," "maritime law," and "legislation" are used throughout interchangeably. Thus, referring to particular provisions of the "national laws," the Report discusses certain provisions of the general martime law and the statutory law of the United States, designating these provisions as being the "law" or "laws" of the United States without particularizing their origin. See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen In Case of Sickness, Including The Treatment of Seamen Injured on Board Ship, First Discussion,* pp. 53, 59, 63, 66, 67, 70, 72, 80, 82, 83, 84, and *passim.*

In view of the broadness of the expression "national laws or regulations" and the latitude thus afforded member nations in applying the provisions of the Convention, we submit that no valid distinctions can be drawn between existing statu-

tory law and decisional law nor between those provisions, such as paragraph 1 of Article 2, which the contracting parties are obligated to apply and others, such as paragraph 2 of Article 2, which the contracting parties may make applicable at their election. Any such distinctions are refuted by the memorandum of the International Labor Office (*supra*, pp. 41–43): "[The expression has] * * * unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion * * * from an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law."

2. *The Historical Background of the Convention Reveals No Intention to Repeal Existing Legal Principles Which Absolve the Shipowner of Liability Where the Seaman Is at Fault.*—Implicit in petitioner's argument that the exceptions permitted by paragraph 2 can be made effective only by enacting legislation after ratification of the Convention is the contention that the purpose of the Convention is to grant the seaman the maximum possible benefits by doing away with the notion of fault as a bar to recovery. We submit

that that contention finds no basis in the history of the Convention.

Examination of the pertinent reports and records of the Convention discloses quite plainly that its general purpose is to achieve a certain measure of standardization internationally through an average formulation of existing national law. Awareness of this limited objective is implicit in the proceedings of the 1929 and 1936 conferences. See International Labor Conference, *Proceedings, Thirteenth Session* (1929), pp. 130–142, 348–376, *passim;*[53] International Labor Conference, *Proceedings, Twenty-first Session* (1936), pp. 72–84, 247–258, *passim.* And the reports made by the International Labor Office state specifically that the Draft Convention, which it prepared, is a compromise solution. See Inter-

[53] For example, at the outset of the general discussion, the Chairman of the Committee stated: (*id.* at 131):

"The question before the Committee was whether the development of the shipowner's liability and of social insurance should be left to the free play of forces within national legislation or whether they should be subjected to some form of international regulation. The Employers' Group was in favour of leaving them to the free play of forces within national legislation, but the majority of the Committee favoured an international system of regulation. At the same time, it was recognised that any such international system must not aim at the maximum possible benefits for the seaman; it must aim at achieving a reasonable average which can be applied in any country. In some cases there may be a possible divergence of opinion—there were in fact divergences in the Committee—as to the scope and the amount of these benefits and of the protection to be granted to the seaman."

national Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, First Discussion, passim;* International Labor Conference (Geneva 1931), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), *passim.* Thus, the 1929 Report ("Grey Report") concludes, after analyzing existing law, that (p. 202) "The difficulties are considerable, but by no means insuperable. For on the whole the laws are fairly concordant, and it has been found possible to indicate for the most important problems solutions, in the nature of compromises, which might be embodied in a Draft Convention or Recommendation." Similarly, the 1931 Report, which incorporates the text of the Draft Convention prepared by the Office after examination of the replies received to the questionnaire circulated by the Office, observes that (p. 159) "* * * the preceding Chapter gave a comparative analysis of the replies of the Governments, from which the Office has endeavoured to show that on most of the essential points agreement was possible, and to deduce the average solutions suitable for treatment in a Draft Convention."

Specifically, it is manifest from these reports and records that an exception based on the notion of fault represents an average solution in its

formulation. See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, First Discussion*, pp. 41–45, 210–211; International Labor Conference (Geneva 1931), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), pp. 29–43, 125–129; 161–162; International Labor Conference, *Proceedings, Thirteenth Session* (1929), pp. 137–139; 350, 363, 373; International Labor Conference, *Proceedings, Twenty-first Session* (1936), p. 250 (see *infra*, pp. 71–77).

Moreover, the replies of the Governments to the questionnaire circulated by the International Labor Office show plainly that the notion of fault was deliberately introduced into the proposed Convention because of the then existing state of national law of the member Governments. See Report II, *op. cit, supra* at pp. 29–43, 161–162. Although many of the replies were rather elaborate, it is significant that, in none of them, is there any request or suggestion that an exception based on the notion of fault would have to be the subject of affirmative statuary enactment by the contracting Governments before it would become operative in nations where such an exception was already recognized or enforced by existing legal principles.

This history, we submit, refutes the contention that the Convention is intended, in this regard, to adopt a standard of liability higher than that which prevailed under the maritime law of the member Governments. To the contrary, it discloses the adoption of a standard which is an average formulation of existing law.

3. *The Decision Below Is in Accord with the Construction Given Article 2 by the Executive Departments.*—In support of his position, petitioner relies primarily on a statement made in 1939 by Secretary of State Hull with reference to H. R. 6881, and upon the President's proclamation of October 29, 1939 (*supra*, pp. 33, 35). These statements, if interpreted as petitioner would read them, are inconsistent with previous and subsequent executive expressions and actions, and, as we have already indicated, are not only unsupported by, but indeed inconsistent with, the history and purposes of the I. L. O. Conventions in general and this Convention in particular.

The reports submitted to the Senate in 1937 by the executive departments recommending ratification of the Convention rebut any inference that this Government intended ratification to have the effect of repealing existing general maritime law. These reports informed the Senate that existing standards in this country were as high or higher than those provided in the Convention (with one exception not here relevant) and recommended ratification on the ground that the

Convention would raise international standards to the level of American law and thus equalize operating costs. See Sen. Exec. Rep. 8, 75th Cong., 3d Sess., pp. 3, 6, 7, 10, 12, 13, 14, 16–19. Thus, summarizing the observations of the interested departments, Secretary of State Hull stated (*id.* at p. 3):

> Existing standards of safety and labor conditions upon American vessels, whether imposed by statute or adopted in general practice, are in general and with certain exceptions set forth in detail in the accompanying reports from the governmental agencies most directly concerned, equal to or higher than those fixed by these conventions.
>
> Accordingly, ratification of these draft conventions will impose only a comparatively slight additional financial burden upon the operation of the American merchant marine. Ratification by other governments which compete with us in the international shipping trade and whose standards of employment on board ship are below those set forth in these draft conventions, will, however, considerably increase the operating costs of the merchant marines of these nations.
>
> The accompanying report of the American Government delegates refers to the desirability of "equalizing operating costs on merchant vessels in the competitive international trade", and adds that "it was the unanimous judgment of the American

> delegation that if promptly ratified by the requisite number of member States to make them effective, the conventions will go far to equalize operating costs as between American sea-going merchant vessels and the vessels of America's principal maritime competitors."
>
> The delegates point out that the American representatives endeavored persistently "to raise international standards, particularly of hours and manning, to the level of American law and practice."

The Senate Subcommittee similarly reported that "American law provides standards substantially equal to or higher than those in the draft convention." *Id.* at p. 2.[34] In presenting the Convention on the floor of the Senate, Senator Thomas, speaking for the Senate Committee on Foreign Relations, referred to the favorable reports of the various executive departments and assured the Senate that "if every safeguard which anyone could possibly ask for had not been taken in the way of reservations and in the way of protection," and "if there were the least bit of doubt

[34] See *Jordine* v. *Walling* (C. A. 3), opinion as amended December 14, 1950:

"* * * But even if we assume that the treaty was self executing, which may be doubtful, it is apparent from an examination of the terms of Articles 2, 3 and 4 that the liability which it imposed upon shipowners in respect of seamen was no greater than that which the maritime law as enforced in the United States had previously imposed upon American shipowners. The convention in this respect was merely declaratory of the existing American law of maintenance and cure."

about any of these conventions," he would not suggest ratification at this time. 83 Cong. Rec. 9029. On the basis of these assurances, the Convention was ratified without further discussion.

These expressions of opinion by the executive departments and the Senate are utterly inconsistent with the construction of Article 2 for which petitioner here contends. If the exceptions permitted by the Convention can be made effective only by the adoption of legislation, ratification would have repealed the pertinent maritime law. But, in that event, contrary to the assurances given the Senate by the executive departments and the Committee on Foreign Relations, ratification would greatly have increased the operating costs of American shipowners[55] and placed them at a disadvantage with respect to the operating costs of other maritime nations, pending the enactment of implementing legislation.

It is most improbable, therefore, that the executive departments intended to express the view two years later that ratification did have precisely that effect. It should be emphasized that inclusion in H. R. 6881 of provisions enacting into

[55] Costs would be increased in at least two respects: (1) the shipowner would be absolutely liable for maintenance and cure irrespective of fault or concealment, or of whether the injury occurred in the service of the ship; and (2) liability would be extended by virtue of Article 1 to persons such as longshoremen and employees of independent contractors who are not entitled to maintenance and cure under the general maritime law.

law the exceptions permitted by the Convention cannot be taken as an indication that the exceptions could not be availed of without statutory enactment. Those provisions may well have been included not only out of excess of caution, but out of a desire to codify the maritime law in the field covered by the Convention in so far as the terms of the Convention left room for national discretion.[36] The statements relied upon by petitioner, made in an effort to persuade the Congress of the desirability of enacting such legislation, may well have derived from the same motives. So read, these statements may be reconciled not only with the contemporaneous executive construction of the Convention in 1937 but with executive construction subsequent thereto.

By both action and failure to act, the executive departments have, since 1939, affirmed their belief that ratification of the Convention has not worked a repeal of the pertinent general maritime law. Thus, the annual reports filed by this Government with the International Labor Office pursuant to Article 22 of the Constitution of the I. L. O. state that the exceptions permitted by Article 2 of the Convention are in force by virtue of existing

[36] Cf. H. R. Rept. 1328 (*supra*, p. 31) recommending enactment of H. R. 6881 "to the end that the extent of the obligations may be certain and fixed" (p. 4). See also Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 6726 and 6881, 76th Cong. 1st Sess., pp. 9, 33; Hearings before the Subcommittee on the Committee on Commerce, United States Senate, on H. R. 6881, 76th Cong. 3d Sess., pp. 91–92, 303.

maritime law.[57] In this connection, it is not without significance that the several maritime unions have, by their silence, apparently acquiesced in this executive construction of the Convention. Although copies of these reports are sent annually to the American Federation of Labor in accordance with Article 23 of the I. L. O. Constitution, no observation thereon of any nature has ever been received.[58] Finally, although the Government was the principal shipowner during the war years and is still a major shipowner, the executive branch has taken no steps since 1939 to effect the enactment of an implementing statute which would affirmatively except it from liability as a shipowner under Article 2 of the Convention. Such non-action is consistent only with the view that an implementing statute is not required.[59]

---

[57] See, *e. g.*, the report for the period July 1, 1949, to June 30, 1950, which is reprinted in the Appendix, pp. 125–127.

[58] See report for the period July 1, 1949, to June 30, 1950, Appendix, p. 137.

[59] It should be noted that the provisions in question evoked little or no opposition in Congress, the bill failing of passage because the Senate Committee added to it other highly controversial provisions. See p. 30, *supra*. Hence petitioner's suggestion (Br. p. 32) that the omission of Congress to enact into statute the exceptions permitted by the convention represented a deliberate "national policy not to make exceptions" is entirely without support.

Petitioner's further argument from the enactment of legislation in connection with the Officers Competency Certificate Convention (Br. pp. 31–32) is equally without merit. The exception embodied in that legislation was not reflected in any existing rule of maritime law and hence could be availed of only through enactment of a specific statute.

We submit, therefore, that, contrary to petitioner's assertions, the decision below is in accord with the construction given the Convention by the executive departments. But even if the 1939 statements are to be construed as petitioner construes them, the most that can be said is that the executive construction of paragraph 2 of Article 2 has been inconsistent. In such circumstances this Court would be wholly justified in adopting that construction which best harmonizes with the text and purposes of the Convention and with the understanding of it expressed by the I. L. O. itself.

II

THE COURT BELOW PROPERLY DENIED RECOVERY OF MAINTENANCE AND CURE BECAUSE OF PETITIONER'S MISCONDUCT

Petitioner further challenges the decision below on the grounds that the standard applied by the court finds no warrant either in the Convention or in the general maritime law and that, in any event, his misconduct falls short of that standard. We submit that there is no merit to either contention.

A. CONDUCT BY A SEAMAN IN RECKLESS DISREGARD OF HIS OWN SAFETY IS A BAR TO RECOVERY FOR MAINTENANCE AND CURE UNDER THE CONVENTION AND GENERAL MARITIME LAW

Although both courts below employed the term "Gross negligence" in describing the standard of conduct which defeats the seaman's traditional

right to maintenance and cure, analysis of the opinions reveals that those words were intended to signify not merely a degree of negligence but conduct which is in reckless disregard of safety.[60] Thus, Judge Medina observed that (R. 108):

> Attempts to classify the various graduations of negligence have largely proved elusive. Generalities are likely to lead to error in particular situations. If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another. This being true it is hard to find any definition of "gross" negligence which will fit into the pat-

[60] See American Law Institute, *Restatement, Torts* (1934) § 500, *Comment g*, which explains the distinction as follows:

"*g. Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency in that reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."

> tern of the maintenance cases other than that of a reckless disregard of safety. Restatement, Torts §§ 500, 502 (1934). * * *

The court below did not reject this test, but differed with Judge Medina solely on the question whether, on the undisputed evidence, such gross negligence had been shown. Examining petitioner's conduct, as disclosed by his own testimony, it found that he had acted in reckless disregard of his own safety (R. 141): "We think that a man who acts as he did under circumstances of danger does not show even a minimal degree of regard of the consequences of his act. * * *"[61] Any doubts as to the standard applied by the court below are dispelled, we believe, by the court's opinion on petition for rehearing. Petitioner, apparently reading the first opinion of the court below as employing the words "gross negligence" to mean merely a variant of negligence, urged at great length on petition for rehearing that the element of wilfulness or wantonness must be present if recovery is to be defeated either under the general maritime law or Article 2 of the Convention (R. 143–

[61] "* * * an actor's conduct is in reckless disregard of his own safety if he does an act or fails to do an act knowing or having reason to know of facts which would lead him, as a reasonable man, to realize that such conduct not only creates an unreasonable risk of bodily harm to himself but that such risk involves a high degree of probability that substantial bodily harm will result to himself." See American Law Institute, *Restatement, Torts* (1934) § 502, *Comment*.

149, 152). In reply, the court stated that (R. 157): "These words [wilful act, default or misbehavior] are used to describe conduct which will preclude recovery of maintenance, and that is precisely the meaning of 'gross negligence' as stated in our original opinion. * * *"

The standard thus applied is, we believe, entirely in accord with this Court's pronouncements in the *Aguilar* case. In *Aguilar,* the Court fully reviewed the seaman's traditional right to maintenance and cure and recognized that it covers all injuries and ailments incurred without "* * * disqualifying misconduct * * *." 318 U. S. 724, 734. Various phrases were employed to indicate the type of misconduct which was disqualifying. The Court stated that only "* * * culpable misconduct * * * some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. * * * the seaman's fault, unless gross, cannot defeat it * * *" (pp. 731, 734). Plainly, to act in reckless disregard of one's own safety is to commit a "deliberate act of indiscretion" or "gross fault."

Examination of the cases cited by this Court in *Aguilar* (p. 731) lends additional support to the standard used below. Thus, in *Peterson* v. *The Chandos,* 4 Fed 645 (D. Ore.), the court declared that "* * * the fault which will forfeit this right upon the part of the seaman must be some

positively vicious conduct, such as gross negligence or wilful disobedience of orders. * * *" (*Id.* at 651). And in *The J. F. Card,* 43 Fed. 92 (E. D. Mich.), it was observed that "* * * it is too well settled to require a citation of authorities that a seaman taken sick or receiving injuries in the service of the ship is entitled to be treated at the expense of the ship, unless such injuries are received in consequence of his own gross carelessness. * * *" (*Id.* at 93.) Similarly, the court stated in *The Ben Flint,* 3 Fed. Cas. No. 1299 (D. Wis.), that "* * * to forfeit a claim for care or attendance under the rule, the disability or sickness of the seamen must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience to orders, and persistent neglect of duty. * * *" (p. 185.)[62] See, also, *Ellis* v. *American Hawaiian S. S. Co.,* 165 F. 2d 999, 1001 (C. A. 9); *Lage* v. *United States,* 90 F. Supp. 583, 585 (S. D. N. Y.); *Olsen* v. *Whitney,* 109 Fed. 80 (N. D. Calif.); *Reed* v. *Canfield,* 20 Fed. Cas. No. 11,641 (C. C. D. Mass.). There can be little question that a reckless disregard for one's own safety falls within the types of conduct these opinions describe.

[62] The peculiar character of labor requirements aboard ship, especially as they existed in 1860–90, readily explains the reference in these decisions to wilful misconduct and gross negligence as being "vicious" or as "operating as a fraud upon the owners." A ship embarks only the number of men indispensable to form a crew, and the replacement

We further submit that the standard applied below is synonymous with the words "wilful act, default or misbehavior" in paragraph 2 of Article 2 of the Convention. On their face, these words comprehend a "deliberate act of indiscretion" signified by a reckless disregard of safety; and examination of the pertinent reports and records of the Convention bears out this construction.

As we have already noted above, pp. 58–59, the choice of those words in the Convention represents an average formulation of the maritime law of the several member Governments. Thus, the "Grey Report" observes that numerous expressions are employed in the national laws to define the notion of fault— "* * * negligence, wilful act or omission, serious fault, serious delinquency, dereliction of duty, misbehavior, reprehensible or punishable action, sickness or injury wilfully incurred"—and concludes that "The Conference will have to decide whether it intends to introduce the notion of fault into the international regulations, and, if so, it will have to state whether the rights of seamen and the obligations of ship-

---

of seamen who become incapacitated for work during the voyage can take place only at the various ports of call, where, indeed, the recruitment of competent replacements may meet with considerable difficulty. The reduction in the number of hands available, especially if the voyage is prolonged, may entail serious difficulties in the working of the ship and threaten her safety. In any case, it results in an excess of labor and fatigue for the rest of the crew.

owners will be restricted in case of fault, or in case of serious fault, or only in case of wilful misconduct * * *." See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, First Discussion*, pp. 42, 211. Accordingly, in preparing its draft conclusions of the points upon which the Conference should ask the International Labor Office to consult the Governments, the Office suggested consultation on a "Possible exception in case of sickness, injury or death due to the fault of the seaman, to his serious fault, or only to his wilful fault." See International Conference, *Proceedings, Thirteenth Session* (1929), pp. 348, 350.

The 1929 Conference, although agreeing that the Governments should be consulted on the question of introducing the notion of fault into international regulations, disagreed as to the formula chosen by the Office. It was of the opinion that it would be preferable to deal with injury and sickness separately. As regards injury, the possibility of an exception was maintained only in the case of "injury intentionally caused by the seaman." (*id.* at p. 363); as regards sickness the following proposals were suggested in the course of discussion (*ibid.*, see also p. 138):

> (1) Possible exception in case of sickness due to the seaman's own act.

(2) Possible exception in case of sickness due to the wilful misconduct of the seaman or to his own act.

(3) Possible exception in case of sickness intentionally caused by the seaman.

The definitive text finally adopted by the Conference stated as follows (*id.* at p. 373):

(a) possible exception in case of injury intentionally caused by the seaman;

(b) possible exception in case of sickness due to the wilful misconduct of the seaman or to his own act.

In accordance with this formulation, questionnaires were then circulated by the Office among the Governments asking:

9. Do you consider it necessary to provide for exceptions:

(a) in case of injury wilfully caused by the seaman;

(b) in case of sickness due to the wilful misconduct of the seaman, or to his own act?

See International Labor Conference (Geneva, 1931), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Skip, Second Discussion* (Report II), p. 29.

In their replies to this question, many of the Governments rejected the narrow exception suggested by the 1929 Conference (*id.*, at pp. 30–43, 125–129). Thus, it was variously proposed that an exception be made for injury or sickness

"* * * imputable to the seaman's own wilful fault, or due to gross negligence on the part of the seaman, or concealed at the time of the engagement * * * wilfully caused by the seaman or due to grave negligence on his part * * * due to the wilful act or inexcusable misconduct of the seaman * * * wilfully caused by the seaman or due to gross negligence of the seaman * * * wilfully caused by the seaman or due to his serious misconduct * * * due to the seaman's own wilful act or default * * * due to the fault of the seaman or concealed by him at the time of engagement * * * due to the seaman's own fault or contracted when he is on shore leave without authorization * * * wilfully caused by the seaman, or due to serious fault on his part, or concealed by him at the time of his engagement" (*id.* at pp. 125–128).

Analyzing these proposals, the Office observed that they (*id.*, at p. 128) "* * * appear to have one idea in common that has attracted the attention of nearly all Governments, and that is the idea of wilfulness. It is this factor of wilfulness that plays a decisive part in the definitions of inexcusable fault, serious fault, grave negligence, etc." and concluded that (*id.*, at p. 129), "It therefore considers that the wishes of most Governments will be met by proposing the introduction in the international regulations of an exception for injury or sickness due to the wilful misconduct of the seaman, and injury or sickness intentionally

concealed at the time of the engagement." Accordingly, the Office prepared a proposed Draft Convention containing the following provision (*id.* at p. 170):

> "Article 3 (2) Nevertheless, national laws or regulations may make exceptions in respect of:
>
> * * * * * *
>
> (b), injury or sickness due to the wilful misconduct of the sick, injured or deceased person, and sickness or infirmity intentionally concealed when the engagement is entered into.

This formulation by the Office was rejected by the Conference in 1936 as lacking precision. The report of the Committee on the protection of seamen in case of sickness or accident states as follows:

> Three amendments to this text were proposed, two of which were intended to give greater precision to the notion of "misconduct", while the third was for the purpose of limiting the restrictions allowed by the Office text in case of death.
>
> The first of these amendments, proposed by the Employers' members, read as follows:
>
> Substitute for the [illegible] "wilful misconduct" the words [illegible]ct, default or misbehavior."
>
> The second amendment, proposed by a Government member, was drafted thus:

After the words "wilful misconduct" insert the words "or gross negligence."

These amendments were based on the view that the Office text did not seem to cover all the cases which might arise, and that the shipowner ought not to be held liable for the consequences of the act or even for the negligence of the seaman. A Government member observed that he would be prepared to support the first of these amendments if the word "wilful" were maintained, and the Employers' members then altered their amendment to read as follows:

Substitute for the words "wilful misconduct" the words "wilful act, default or misbehavior."

On being put to the vote, the amendment as thus drafted was adopted by 23 votes to 16.

The second amendment, on the other hand, was rejected by 18 votes to 3.

The third amendment, which was submitted by a Government member, read as follows:

After the words "deceased person" insert the words "sickness due to his own act."

This amendment was withdrawn.

See International Labor Conference, *Proceedings, Twenty-first Session* (1936), p. 250.[93]

[93] The discussions taking place during committee meetings are not reported verbatim in the record of proceedings.

In consequence of the amendments accepted by the Committee, paragraph 2 of Article 3 of the Draft Convention proposed by the Office assumed the following form (*ibid.*):

> * * * injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person, and sickness or infirmity intentionally concealed when the engagement is entered into.

And in that form it was adopted by the Conference without debate (*id.* at p. 79) and sent to the Drafting Committee. The Drafting Committee then submitted a draft (in which Article 3 was renumbered Article 2 in the form in which it now appears in the Convention) which was adopted by the Conference at a final record vote (*id.* at pp. 171, 269, 328).

In our view, this history may fairly be read in support of our position that the words "wilful act, default or misbehavior" are sufficiently broad to encompass the reckless disregard of safety. Although the phrase "wilful misconduct or gross negligence" was rejected by the Committee at the 1936 Conference in favor of "wilful act, default or misbehavior," we do not think it a proper inference that the Conference thereby intended to remove from the definitions of disqualifying conduct that conduct which is in reckless disregard of safety. Rather, it is to be inferred that, in substituting the words "act, default or misbehavior" for "misconduct" in the

term "wilful misconduct" proposed by the International Labor Office, the Conference intended to enlarge the classes of disqualifying conduct. As the Committee report notes (*id.* at p. 250): "These amendments were based on the view that the Office text did not seem to cover all the cases which might arise, and the shipowner ought not to be held liable for the consequences of the act or even for the negligence of the seaman. * * *" In this regard, it is not without significance that many of the Governments had already expressed the desire, by their replies to the questionnaire (*supra*, pp. 73–74), of providing for an exception broader than that previously proposed.

We submit, therefore, that the standard applied by the court below is in accord with the general maritime law and Article 2 of the Convention.

B. PETITIONER'S CONDUCT IN THE CIRCUMSTANCES OF THIS CASE WAS IN RECKLESS DISREGARD OF SAFETY

We believe that the record fully supports the unanimous judgment of the court below that petitioner did not "* * * show even a minimal degree of regard for the consequences of his act. * * *." (R. 141.)

According to petitioner's testimony, the facts are as follows: Petitioner, a messman aboard the *Anna Howard Shaw*, went ashore on leave while the vessel was in the Bay of Naples on October

30, 1944. Together with two other members of the crew, he spent some time sightseeing in the water-front town of Bagnoli, stopping at various stores and drinking a bottle of wine (R. 36, 37, 71). They then entered a dance hall where they consumed another glass of wine apiece (R. 36, 71, 82).[64] After about an hour and a half, most of which time was spent in dancing and talking with some Italian women (R. 65, 81), petitioner entered an adjoining room, overlooking the sea, which had French doors reaching to the level of the floor (R. 37, 66, 82). On the other side of these doors, which were open, petitioner observed a wholly unprotected ledge which extended out from the building some two or three feet (R. 38,

[64] In this regard, the opinion of the district court states as follows (R. 107–108):

"The evidence as to libellant's intoxication is conflicting. He says he had had only about a third of a small bottle of wine and one glass more before he was injured. The record of the hospital to which he was taken after his injury, however, contains the entry 'acute alcoholism.' Libellant says he may have presented a stupefied appearance when he reached the hospital, because he had previously been given morphine; therefore the hospital doctors may have thought him drunk. The ship's log is interesting but inconclusive. It reads:

"'* * * Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter, and James M. Barr, messman, stated Warren was sober. Injury apparently accidental.' I am inclined to think libellant was less sober than he says he was, but I find he was not so under the influence of liquor as to be barred from recovery."

The court below accepted the finding that petitioner was not drunk (R. 140).

67, 68). There was no guardrail around the ledge, but there were masonry posts at each end which extended up to the roof of the building (R. 38, 87). Attached to one of these posts, by brackets fastened in the masonry, was a thin metal rod about a half-inch in circumference, comparable, according to petitioner, to a "lightning arrester" or a "lightning rod" (R. 38, 69). The ledge was approximately 30 to 35 feet above the ground (R. 39, 83). Petitioner went out on this ledge to a position where the toes of his shoes were about six inches from the edge (R. 83, 85), and remained there a few minutes observing the scenery.[5] He then leaned over, and, taking just a "casual glance" at the metal rod, grasped the rod (R. 38, 68, 70). As he took hold of the rod and leaned over the edge, the rod came loose, petitioner lost his balance and fell some 30 feet to the ground below, fracturing his right lower leg (R. 38, 39, 68, 83).

---

[5] Petitioner's brief states that "he observed other people go over and onto the ledge and out to the edge and look, and so did he" (p. 4). The record discloses the following colloquy on Recross Examination (R. 88):

"Q. Do I understand you to say now that there were some people standing to the right or to the left of you as you were standing on the edge? Is that your testimony?—A. I don't know whether they were out to the ledge or whether they were casually drifting around the room.

"Q. You weren't paying any attention?—A. That is right. I do not know just where they were, that's all."

Petitioner's indiscretion is graphically portrayed by his own words. Thus, petitioner testified as follows (R. 38, 68):

> * * * There was no rail, protected railing. It was just a straight platform but there was an iron rod running up the side of the post, which would be comparable maybe to our lightning arrester or something of that type, and I walked out there and stood and watched a little bit with my hand on the post, and it was a masonry post, and I looked over a little bit and somehow or other I took hold of this rod which was going up along the side, probably a half-inch metal rod, and I took hold of it and kind of looked out a little bit to see, it let loose unexpectedly, which was quite a surprise, you know, and I did not have time to recover myself, * * *
>
> * * * * *
>
> * * * I stood * * * probably for about three or four minutes, or maybe five minutes, before I took ahold of this iron and looked over and it pulled loose so easily that it was such a quick surprise that I couldn't recover myself.

Asked whether he had made any inspection of the rod, or the brackets before he took hold of it (R. 69), petitioner replied (R. 70), "Why, just casually. As you would glance on it, if it would look all right, you wouldn't make any note of it

hanging loose at a glance. Naturally, you wouldn't make a very close observation."

To summarize, petitioner, although fully aware of the fact that he had been drinking, went out upon an unprotected ledge, two to three feet wide, which had a sheer drop of 30 to 35 feet. He stood there, about six inches from the edge of the ledge, for about three to five minutes, and then, although certainly cognizant of the fact that a fall would cause serious bodily injury, leaned over the edge and "somehow or other * * * took hold of this rod," which was like a "lightning arrester," without giving it more than just a "casual glance."

Such misconduct on petitioner's part falls well within the established meaning of conduct in reckless disregard of safety. Petitioner knew or had "reason to know of facts which would lead him, as a reasonable man, to realize that such conduct not only creates an unreasonable risk of bodily harm to himself but that such risk involves a high degree of probability that substantial bodily harm will result to himself." See American Law Institute, *Restatement, Torts* (1934) § 502, *Comment; Delaware & H. R. Corp.* v. *Bonzik*, 105 F. 2d 341, 344 (C. A. 3); *Evens* v. *Texas Pac.-Missouri Pac. Terminal R. R.*, 134 F. 2d 275, 276 (C. A. 5). We submit, therefore, that the decision below is clearly correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

LEAVENWORTH COLBY,
JAMES L. MORRISSON,
Special Assistants to the Attorney General.

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

DECEMBER 1950.

APPENDIX

By the President of the United States of America

A PROCLAMATION

Whereas a draft convention (No. 55) with regard to the liability of the shipowner in case of sickness, injury, or death of seamen, was adopted on the twenty-fourth day of October nineteen hundred and thirty-six, by the General Conference of the International Labor Organization, at its twenty-first session held at Geneva October 6–24, 1936, a certified copy of which draft convention, communicated by the Secretary-General of the League of Nations, acting in conformity with the requirements in the nineteenth Article of the Constitution of the International Labor Organization, to the Government of the United States of America as a Member of the said Organization, is, in the French and English languages, word for word as follows [French text omitted in printing]:

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Twenty-first Session on 6 October 1936, and

Having decided upon the adoption of certain proposals with regard to the liability of the shipowner in case of sickness, injury or death of sea-

men, which is included in the second item on the Agenda of the Session, and

Having determined that these proposals shall take the form of a Draft International Convention, adopts, this twenty-fourth day of October of the year one thousand nine hundred and thirty-six, the following Draft Convention which may be cited as the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936:

ARTICLE 1

1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

2. Provided that any Member of the International Labour Organisation may in its national laws or regulations make such exceptions as it deems necessary in respect of—

(a) persons employed on board,

(i) vessels of public authorities when such vessels are not engaged in trade;

(ii) coastwise fishing boats;

(iii) boats of less than twenty-five tons gross tonnage;

(iv) wooden ships of primitive build such as dhows and junks;

(b) persons employed on board by an employer other than the shipowner;

(c) persons employed solely in ports in repairing, cleaning, loading or unloading vessels;

(d) members of the shipowner's family;

(e) pilots.

ARTICLE 2

1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

ARTICLE 3

For the purpose of this Convention, medical care and maintenance at the expense of the shipowner comprises:

(a) medical treatment and the supply of proper and sufficient medicines and therapeutical appliances; and

(b) board and lodging.

ARTICLE 4

1. The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to defray the expense of medical care and maintenance to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide—

(a) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to medical benefits under the insurance or compensation scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

ARTICLE 5

1. Where the sickness or injury results in incapacity for work the shipowner shall be liable—

(a) to pay full wages as long as the sick or injured person remains on board;

(b) if the sick or injured person has dependents, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to pay wages in whole or in part in respect of a person no longer on board to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to cash benefits under the insurance or compensation scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of cash benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is ex-

cluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

ARTICLE 6

1. The shipowner shall be liable to defray the expense of repatriating every sick or injured person who is landed during the voyage in consequence of sickness or injury.

2. The port to which the sick or injured person is to be returned shall be—

(a) the port at which he was engaged; or

(b) the port at which the voyage commenced; or

(c) a port in his own country or the country to which he belongs; or

(d) another port agreed upon by him and the master or shipowner, with the approval of the competent authority.

3. The expense of repatriation shall include all charges for the transportation, accommodation and food of the sick or injured person during the journey and his maintenance up to the time fixed for this departure.

4. If the sick or injured person is capable of work, the shipowner may discharge his liability to repatriate him by providing him with suitable employment on board a vessel proceeding to one of the destinations mentioned in paragraph 2 of this Article.

ARTICLE 7

1. The shipowner shall be liable to defray burial expenses in case of death occurring on board, or

in case of death occurring on shore if at the time of his death the deceased person was entitled to medical care and maintenance at the shipowner's expense.

2. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased person under laws or regulations relating to social insurance or workmen's compensation.

ARTICLE 8

National laws or regulations shall require the shipowner or his representative to take measures for safeguarding property left on board by sick, injured or deceased persons to whom this Convention applies.

ARTICLE 9

National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention.

ARTICLE 10

The shipowner may be exempted from liability under Articles 4, 6 and 7 of this Convention in so far as such liability is assumed by the public authorities.

ARTICLE 11

This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure

equality of treatment to all seamen irrespective of nationality, domicile or race.

ARTICLE 12

Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

ARTICLE 13

1. In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation, each Member of the Organisation which ratifies this Convention shall append to its ratification a declaration stating:

(a) the territories in respect of which it undertakes to apply the provisions of the Convention without modification;

(b) the territories in respect of which it undertakes to apply the provisions of the Convention subject to modifications, together with details of the said modifications;

(c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

(d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in sub-paragraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of sub-

paragraphs (b), (c) or (d) of paragraph 1 of this Article.

ARTICLE 14

The formal ratifications of this Convention shall be communicated to the Secretary-General of the League of Nations for registration.

ARTICLE 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Secretary-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Secretary-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

ARTICLE 16

As soon as the ratifications of two Members of the International Labour Organisation have been registered, the Secretary-General of the League of Nations shall so notify all the Members of the International Labour Organisation. He shall likewise notify them of the registration of ratifications which may be communicated subsequently by other Members of the Organisation.

ARTICLE 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first

comes into force, by an act communicated to the Secretary-General of the League of Nations for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

ARTICLE 18

At the expiration of each period of ten years after the coming into force of this Convention, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall consider the desirability of placing on the Agenda of the Conference the question of its revision in whole or in part.

ARTICLE 19

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above,

if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

ARTICLE 20

The French and English texts of this Convention shall both be authentic.

AND WHEREAS it is provided in Article 14 of the said draft convention that the formal ratifications thereof shall be communicated to the Secretary-General of the League of Nations for registration and in Article 15 that the convention shall come into force twelve months after the date on which the ratifications of two Members of the International Labor Organization have been registered with the Secretary-General of the League of Nations and that thereafter the convention shall come into force for any Member twelve months after the date on which its ratification has been registered;

AND WHEREAS the said draft convention was duly ratified on the part of the United States of America subject to understandings as follows:

> "That the United States Government understands and construes the words 'vessels registered in a territory' appearing in this convention to include all vessels of the United States as defined under the laws of the United States.

"That the United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only.

"That the provisions of this convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this Government reserves its decision."

AND WHEREAS the ratification of the said draft convention by Belgium was registered with the Secretary-General of the League of Nations on April 11, 1938, subject to subsequent decisions regarding application to the Belgian Congo and the territories under Belgian Mandate and the ratification thereof by the United States of America, subject to the understandings above recited, was registered with the Secretary-General on October 29, 1938;

AND WHEREAS by such registrations the said draft convention became a formal convention between the United States of America and Belgium on October 29, 1938, which, pursuant to Article 15 thereof, will come into force as between the United States of America and Belgium on October 29, 1939, twelve months after the date on which the ratification of the United States of America was registered with the Secretary-General of the League of Nations, and pursuant to the same Article, will come into force, for other Members of the International Labor Organization whose ratifications may have been or hereafter may be registered with the Secertary-General of

the League of Nations subsequent to October 29, 1938, twelve months after the date on which the ratification has been or may be registered in each case;

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled in good faith by the United States of America and the citizens thereof, on and from October 29, 1939, subject to the understandings above recited and to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on the part of the United States of America.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-ninth day of September in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[SEAL.] FRANKLIN D ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.

OCTOBER 27, 1950.

Mr. THACHER WINSLOW,
Director, Washington Branch,
International Labor Office,
1825 Jefferson Place NW.,
Washington, D. C.

Re: Walter K. Warren v. United States, No. 87, Supreme Court, October Term, 1950

DEAR MR. WINSLOW: The above-entitled case, in which certiorari has recently been granted by the United States Supreme Court, involves a question of interpretation of the Shipowners' Liability Convention of 1936 (Convention No. 55). In pertinent part the Convention provides:

> ARTICLE 2. 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.
>
> 2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured, or deceased person;
>
> (c) sickness or infirmity intentionally concealed when the engagement is entered into. * * *

We would appreciate being advised whether the International Labor Office considers these clauses to be self-executing or whether implementing legislation is required to give them effect. In

particular, we are interested in ascertaining whether the International Labor Office construes the language "national laws or regulations" as having reference solely to statutes or whether that language includes, as well, the principles of general maritime law enunciated and enforced by the courts. In this connection, your attention is called to the authentic French text which employs the term "legislation nationale."

Since briefs in the above-entitled case must be filed with the Supreme Court by November 20, we would be most grateful if this information could be furnished as soon as possible.

Sincerely yours,

PHILIP B. PERLMAN,
Solicitor General.

INTERNATIONAL LABOUR OFFICE, GENEVA

13 Nov. 1950.

DEAR MR. SOLICITOR GENERAL: Mr. Winslow has communicated to me your letter of 27 October enquiring whether the International Labour Office considers certain clauses of the Shipowners' Liability Convention, 1936, to be self-executory.

I have pleasure in enclosing a memorandum stating our view on the subject, and will be happy to remain available if you should wish for any further information on the subject.

Sincerely,

(s) David A. Morse,
DAVID A. MORSE,
Director-General.

The SOLICITOR GENERAL,
Washington, D. C.

1. The International Labour Office has been asked by the Solicitor-General of the United States to advise whether it considers paragraphs 1 and 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, to be self-executing or whether implementing legislation is required to give them effect, and in particular whether it construes the language, "national laws or regulations" as having reference solely to statutes or whether that language includes, as well, the principles of general maritime law enunciated and enforced by the courts.

2. The International Labour Office has no special authority under the provisions of the Constitution of the International Labour Organisation to interpret the provisions of an International Labour Convention, authority to give an internationally binding interpretation being reserved to the International Court of Justice. The following observations may, however, be of assistance in evaluating the view which the International Labour Conference, to which, under the Constitution of the Organisation, reports concerning the application of Conventions by Members which have ratified them are furnished each year, would be likely to take of the questions raised by the present case.

3. The obligation undertaken by a Member of the International Labour Organisation when ratifying a Convention is defined by the Constitution of the Organisation in the following language: "* * * the Member * * * will take such action as may be necessary to make effective the provisions of the Convention." The nature of the action required in the particular country to

make effective the provisions of the Convention is left to be determined in the first instance by that country, subject to the procedure for International examination of annual reports made by ratifying Members provided for in the Constitution of the Organisation. As the extent to which the provisions of an international Convention are self-executory differs considerably under the constitutional law of different countries, no uniformity in the matter has been, or is likely to be, practicable. The International Labour Organisation has been concerned to satisfy itself that, in cases in which no legislation which clearly implements the provisions of a Convention has been enacted, the Convention is effectively self-executory under the constitution or general law of the country concerned and the forms of annual report addressed to Members of the International Labour Organisation for the purpose of securing information concerning the application of Conventions contain a question designed to elucidate this point.[1] Subject to their being satisfied on this

[1] Question I of the Form for the Annual Report on the Convention concerning Shipowners' Liability (Sick and Injured Seamen), 1936, reads as follows: "Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, etc., to the International Labour Office with this report. Where, notwithstanding the obligations resulting from the act of ratification, national law is not already in complete harmony with the provisions of the Convention, please indicate (a) to what extent the ratification has modified previously existing law, and (b) what steps have been taken to ensure the observance of the provisions of the Convention."

point, the competent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and its existing law.

4. From an international point of view, what is essential is that the provisions of a Convention should be fully applied; in regard to the manner of application, both the Constitution of the Organisation and the terms of the individual Conventions deliberately leave a wide measure of discretion to each country; it has frequently been pointed out that so many of the Conventions require detailed national regulations, administrative arrangements or provisions for inspection, penalties and other means of enforcement, that some legislation will, in most cases, be necessary to make the provisions of a Convention effective; but the criterion is solely whether or not the provisions of a Convention *can* be made fully effective on a self-executory basis.

5. No record has been found of any case in which it has been necessary for the International Labour Organisation to express an opinion on the question whether the term "national laws or regulations" which is frequently included in International Labour Conventions refers solely to statutes or can be regarded as also including the principles of general maritime law. The expression has, however, unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion and it would appear to be consistent with

this general purpose to interpret the provision as allowing each party to the Convention to make the exceptions provided for either by specific enactment or by the application of some existing legal principle or rule. The term "national laws or regulations", without explicitly stating this conception, would not appear to be inconsistent with it, and the French term *"législation nationale"* is, if anything, of a more general and comprehensive character and includes not merely legislation in the narrowest technical sense, but other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law. It is, of course, for the courts of each country to decide what effect the incorporation of the terms of the Convention in national law as the direct result of ratification, by specific statutory enactment, or otherwise, may have had, but from an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law.

6. A fuller survey of the extent to which the questions raised by this case may have arisen in other countries in connection with this or other Conventions could be made, but its completion would take some time and it is doubtful whether there exist any cases sufficiently analagous to throw further light upon the matter.

INTERNATIONAL LABOUR OFFICE FORM FOR THE ANNUAL REPORT ON THE CONVENTION

CONCERNING THE LIABILITY OF THE SHIPOWNER IN CASE OF SICKNESS, INJURY OR DEATH OF SEAMEN, GENEVA, 1948

INTERNATIONAL LABOUR OFFICE

ARTICLE 22 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION

Article 22 of the Constitution of the International Labour Organisation runs as follows:

> *Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.*

In accordance with the above provisions, the Governing Body of the International Labour Office examined and approved the following form of report. This has been drawn up in such a manner as to facilitate the supply of the required information on uniform lines and the preparation of the summary of reports to be submitted by the Director-General of the International Labour Office under Article 23 of the Constitution of the International Labour Organisation.

It is requested that Governments, in drafting reports, should not reproduce the full text of the questions contained in the form, but should prefix

to each of their answers the numbers of the main questions in the form and the numbers of the Articles of the Convention.

Report for the period _____ to _____ in accordance with Article 22 of the Constitution of the International Labour Organisation, from the Government of _____ on the measures taken to give effect to the provisions of the

CONVENTION CONCERNING THE LIABILITY OF THE SHIPOWNER IN CASE OF SICKNESS, INJURY OR DEATH OF SEAMEN

Ratification of which was registered on _____

I. Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, etc., to the International Labour Office with this report.

Where, notwithstanding the obligations resulting from the act of ratification, national law is not already in complete harmony with the provisions of the Convention, please indicate (a) to what extent the ratification has modified previously existing law, and (b) what steps have been taken to ensure the observance of the provisions of the Convention.

II. Please indicate in detail for each of the following Articles of the Convention the provisions of the above-mentioned legislation and administrative regulations, etc., or other measures under which each Article is applied.

Article I

1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

2. Provided that any Member of the International Labour Organisation may in its national laws or regulations make such exceptions as it deems necessary in respect of:

(*a*) persons employed on board:

(i) vessels of public authorities when such vessels are not engaged in trade;

(ii) coastwise fishing boats;

(iii) boats of less than twenty-five tons gross tonnage;

(iv) wooden ships of primitive build such as dhows and junks;

(*b*) persons employed on board by an employer other than the shipowner;

(*c*) persons employed solely in ports in repairing, cleaning, loading or unloading vessels;

(*d*) members of the shipowner's family;

(*e*) pilots.

In addition, please indicate under what provisions the laws and regulations implementing the Convention are made applicable to foreign seamen.

If advantage has been taken of any of the exceptions provided for in paragraph 2 of this Article, please indicate which of the classes of persons mentioned in this paragraph have been excepted and indicate how these classes are defined.

ARTICLE 2

1. The shipowner shall be liable in respect of:

(*a*) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the examination of the engagement;

(*b*) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of:

(*a*) injury incurred otherwise than in service of the ship;

(*b*) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

(*c*) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

In addition, if any of the exceptions allowed by paragraph 2 are provided for in the national legislation, please indicate which of the contingencies mentioned in this paragraph have been so excepted, and indicate how these contingencies are defined.

Please state whether the national legislation provides for the restriction of the shipowner's liability allowed by paragraph 3.

ARTICLE 3

For the purpose of this Convention, medical care and maintenance at the expense of the shipowner comprises:

(*a*) medical treatment and the supply of proper and sufficient medicines and therapeutical appliances; and

(*b*) board and lodging.

Please indicate the scope of the care provided for in the national legislation, stating whether all necessary medical, surgical and hospital care is included, and, if not, what forms of care are excluded. Please indicate also whether prosthetic appliances are furnished. Please indicate whether the shipowner's liability is limited to a prescribed maximum total or rate of expenditure for care, and, if so, what is the prescribed maximum.

Please indicate what, if any, standards of board and lodging are prescribed in the national legislation, and what, if any, limitation of the total or rate of expenditure for board and lodging is provided for.

ARTICLE 4

1. The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to defray the expense of medical care and maintenance to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(*a*) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to medical benefits under the insurance or compensation scheme;

(*b*) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

Please indicate what, if any, provision is made in the national legislation for ascertaining when the sick or injured person has been cured and when the sickness or incapacity has become permanent. In this connection please indicate what, if any, provision is made for obtaining impartial medical opinion.

If any limitation of the period during which the shipowner is liable for medical care and maintenance, as allowed by paragraph 2, is provided for in the national legislation, please indicate the limitation.

Please indicate whether there exists:

(i) *a scheme of compulsory sickness insurance applying to seamen; and*

(ii) *a scheme of compulsory accident insurance or workmen's compensation applying to seamen; and, if so, please forward the texts of the laws and regulations governing such schemes.*

If such schemes exist, please indicate whether provision is made in the national legislation for terminating the shipowner's liability as allowed by sub-paragraph (a) of paragraph 3, and how the time at which the sick or injured person becomes entitled to medical benefits under such schemes is defined.

Please indicate the principal classes of seamen excluded from the scope of such schemes, mentioning any exceptions which affect particularly foreign seamen or seamen not resident in the territory in which the vessel is registered.

ARTICLE 5

1. Where the sickness or injury results in incapacity for work the shipowner shall be liable:

(*a*) to pay full wages as long as the sick or injured person remains on board;

(*b*) if the sick or injured person has dependants, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to pay wages in whole or in part, in respect of a person no longer on board to a period which shall not be

less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(*a*) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to cash benefits under the insurance or compensation scheme;

(*b*) that the shipowner shall cease to be liable from the time prescribed by law for the grant of cash benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

Please indicate, with reference to subparagraph (b) *of paragraph 1, whether the whole or a part of wages is payable to the dependants of the sick or injured person, and, if a part, what part.*

Please supply the same information, mutatis mutandis, *with reference to paragraphs 2 and 3 of this Article as has been requested with reference to paragraphs 2 and 3 of Article 4.*

ARTICLE 6

1. The shipowner shall be liable to defray the expense of repatriating every sick or injured person who is landed during the voyage in consequence of sickness or injury.

2. The port to which the sick or injured person is to be returned shall be:

(*a*) the port at which he was engaged; or

(*b*) the port at which the voyage commenced; or

(*c*) a port in his own country or the country to which he belongs; or

(*d*) another port agreed upon by him and the master or shipowner, with the approval of the competent authority.

3. The expense of repatriation shall include all charges for the transportation, accommodation and food of the sick or injured person during the journey and his maintenance up to the time fixed for this departure.

4. If the sick or injured person is capable of work, the shipowner may discharge his liability to repatriate him by providing him with suitable employment on board a vessel proceeding to one of the destinations mentioned in paragraph 2 of this Article.

Please indicate, with reference to paragraphs 2 and 4, which of the four destinations (a), (b), (c), (d), *are provided for in the national legislation, and, where alternative destinations are so provided for, what, if any, provisions exist for determining the choice of the destination.*

ARTICLE 7

1. The shipowner shall be liable to defray burial expenses in case of death occurring on board, or in case of death occurring on shore if at the time of his death the deceased person was entitled to medical care and maintenance at the shipowner's expense.

2. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased person under laws or regulations relating to social insurance or workmen's compensation.

Please indicate, with reference to paragraph 1, what, if any, provisions in the national legislation govern the amount of the burial expenses for which the shipowner is liable.

Please indicate whether provision is made in the national legislation for the reimbursement of burial expenses under legislation relating to social insurance or workmen's compensation.

ARTICLE 8

National laws or regulations shall require the shipowner or his representatives to take measures for safeguarding property left on board by sick, injured or deceased persons to whom this Convention applies.

ARTICLE 9

National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention.

In particular, please indicate what, if any, provision is made for decisions having interim effect as regards disputes which occur abroad.

ARTICLE 10

The shipowner may be exempted from liability under Articles 4, 6 and 7 of this Convention insofar as such liability is assumed by the public authorities.

Please indicate to what extent, and in virtue of what provisions of the national legislation, the shipowner is exempted from liability, as allowed by this Article.

ARTICLE 11

This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race.

ARTICLE 12

Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

III. Please state to what authority or authorities the application of the above-mentioned legislation and administrative regulations, etc., is entrusted and by what methods application is supervised and enforced.

IV. Please state whether decisions have been given by courts of law, or other courts, regarding the application of the Convention. If so, please supply the text of such decisions.

V. Please add a general appreciation of the manner in which the Convention is applied in your country, including such statistics as may be available relating to:

(1) the total number of seamen serving on ships which are subject to the provisions concerning shipowners' liability, etc.;

(2) the number of seamen who have been assisted in virtue of these provisions, distinguishing, if possible between persons left ashore in the territory in which the ship is registered and those left ashore elsewhere;

(3) the total expenditure incurred by shipowners in respect of their liability, and where any part of this liability is assumed by a public authority, expenditure incurred by the latter.

Please state whether you have received from the organisations of employers or workers concerned any observations regarding the practical fulfillment of the conditions prescribed by the Convention or the application of the national law implementing the Convention. The information available for the Conference would be usefully supplemented by your communicating a summary of these observations, to which you might add any comments that you consider useful.

VI. Please indicate the representative organisations of employers and workers for which the reports on the application of the Conventions submitted to the Director-General in conformity with Article 22 of the Constitution have been communicated, in accordance with Article 23 of the Constitution of the International Labour Organisation.

Report for the period 1 July 1949 to 30 June 1950 in accordance with Article 22 of the Constitution of the International Labour Organisation from the Government of the United States on the measures taken to give effect to the provisions of the Convention Concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen ratification of which was registered on 29 October 1938

I

1. The following legislation and administrative regulations apply the provisions of the Convention. The leading court decisions are noted in the texts of the annual reports.

Public Health Service	42 U. S. C., Sec. 249.
Regulations	42 CFR, Sec. 32.1 to 32.23, inclusive
Recovery for injury to or death of seamen (Jones Act)	46 U. S. C., Sec. 688.
Longshoremen's and Harbor Workers' Act	33 U. S. C., Sec. 901.
Medicines	46 U. S. C., Sec. 666.
Subsistence to destitute seamen; return to the United States	46 U. S. C., Sec. 678.
Transportation of destitute seamen to the United States	46 U. S. C., Sec. 679.
Incapacitated seamen	46 U. S. C., Sec. 683.
Regulations of State Department	22 CFR, Sec. 118.6.
Deceased Seamen's Effects:	
Duty of Master where seaman dies during voyage	46 U. S. C., Sec. 621.
Proceedings in regard to effects	46 U. S. C., Sec. 622; 42 U. S. C, Sec. 248 (d).
Duties of consular officers	46 U. S. C., Sec. 624.
Regulations	22 CFR, Sec. 118.7.
Effects of seamen dying within the United States	46 U. S. C., Sec. 625.
Commissioner as arbiter	46 U. S. C., Sec. 651.
State Department Regulations for disputes overseas	22 CFR, Part 119.

Actions against United States	46 U. S. C., Secs. 741, 742; 50 U. S. C., App. Sec. 1291.
Unemployment Compensation for seamen	60 Stat. 978.
Workmen's Compensation benefits	5 U. S. C., Sec. 751.
Regulations	20 CFR, Part 1.
Vocational Rehabilitation	29 U. S. C., Sec. 31–41.
Regulations	43 CFR, Sec. 4353.

2. The question whether ratification of the Convention altered existing law, that is, whether the treaty is self-executing, has never been finally determined by the Supreme Court. In the case of *Aguilar* v. *Standard Oil Co.*, 1943, 318 U. S. 724, 738, Chief Justice Stone in a concurring opinion considered certain provisions of the Convention to be self-executing. The majority of the Court held that, on the issue presented, seamen were entitled to recovery under the general maritime law and that it was unnecessary, therefore, to consider the effect of the Convention. See also *Farrell* v. *U. S.* 1949, 336 U. S. 511, 69 Sup. Ct. 707, discussed under Article 3, paragraph 1 on "Shipowners Liability."

II

Article 1

The United States expressed the following understanding as a part of its ratification of the Convention:

> That the provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this government reserves its decision.

In addition, the following understandings were expressed and made part of its ratification:

That the United States Government understands and construes the words "vessels registered in a territory" appearing in this Convention to include all the vessels of the United States as defined under the laws of the United States.

That the United States Government understands and construes the words "maritime navigation" appearing in this Convention to mean navigation on the high seas only.

Under the terms of Article 1, the Convention "applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation," with such specified exceptions as may be made in national laws or regulations. Vessels are, in fact, registered in Alaska, Hawaii, Puerto Rico and the Virgin Islands under the laws of the United States and are provisionally registered in Guam under the laws of the United States. All vessels so registered or provisionally registered are "vessels of the United States as defined under the laws of the United States." Vessels are not registered in American Samoa either under the laws of the United States or under the regulations and orders for the Government of American Samoa. It follows, therefore, that a vessel documented in a territory or possession of the United States is in the same status as a vessel documented in the Continental United States.

The general maritime law, the Jones Act, and the Public Health Act apply to all vessels of the United States. Consequently, with only the minor exceptions hereinafter explained, all of the

measures included in this report relate no less to persons employed on vessels registered in Alaska, Hawaii, Puerto Rico, the Virgin Islands and Guam than to persons employed on vessels registered in the Continental United States. No vessels are registered in American Samoa.

1. The law which implements the Convention (with the exceptions noted hereinafter) applies to the following workers:

General admiralty law

In respect of the rights of seamen to maintenance, cure and other benefits extended them in the general admiralty or maritime law, the Supreme Court has said, quoting from the opinion of the court below (The *Buena Ventura* 243 Fed. 797, 799):

> * * * everyone is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the voyage and welfare of the ship when she is on a voyage. *Norton* v. *Warner Co.*, 321 U. S. 565, 572, 63 Sup. Ct. 747, 1944.

The following workers have been held to be seamen for the purpose of general admiralty law: Masters,[1] wireless operators,[2] engineers,[3] pilots,[4] cooks and stewards,[5] and bartenders.[6]

---

[1] *The E. H. Russell*, 1930, 42 F. 2d 568.

[2] *The Buena Ventura*, 1916, 243 Fed. 797.

[3] *The Bunker No. 2*, 1917, 241 Fed. 831.

[4] *Peterson* v. *United New York and Sandy Hook Pilots' Assn.*, 1934, 6 F. Supp. 649.

[5] *Pacific Mail S. S. Co.* v. *Schmidt*, 1914, 214 Fed. 513; *Marshall* v. *International Mercantile Marine Co.*, 1930, 39 F. 2d 551.

[6] *The J. S. Warden*, 1910, 175 Fed. 314.

The right to compensation for injury caused by the unseaworthiness of a ship extends to all workers "performing the ship's service with the owner's consent." *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 97, 66 Sup. Ct. 872, 878.

Compensation for injury

The right to compensation for injuries or death incurred in the service of the ship extends to the master and members of the crew of all vessels by virtue of the statutory extension of admiralty law commonly referred to as the Jones Act (46 U. S. C., Sec. 688). All other employees on board vessels in navigable waters, with minor exceptions, are covered by the workmen's compensation system established in the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., Sec. 901).

Government medical care

The Public Health Service Act extends government financed facilities for medical care without charge to seamen employed on vessels of the United States. "Seamen" is defined by statute to include—

> any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation. (42 U. S. C., Sec. 201 (h)).

"Vessel" is defined by statute to include—

> every description of water craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water, exclusive of aircraft and amphib-

ious contrivances. (42 U. S. C., Sec. 201 (i)).[7]

The implementing Regulations are found in Title 42, Part 32 of the Code of Federal Regulations.

Public Vessels

By statute, employees of vessels owned or operated by or for the United States or any corporation of the United States as a merchant vessel or tugboat may bring an action for a libel in personam in all cases where, if such vessel were privately owned or operated, the employees could bring proceeding in admiralty (46 U. S. C., Secs. 741, 742).

[7] Medical care is available at facilities of the Public Health Service and, in appropriate cases, at public and private non-Service facilities at the expense of the Service to the following: (a) a seaman taken sick or injured on board or ashore while actually employed on a vessel (42 CFR 32.15); (b) a seaman employed for 60 days of continuous service on a registered, enrolled, or licensed vessel of the United States, a part of which service must have occurred during the 90 days immediately preceding application for care (42 CFR 32.14 (b)); (c) a seaman employed for 60 days of continuous service on a registered, enrolled, or licensed vessel of the United States even though more than 90 days have elapsed since his last service, provided he has not changed his occupation since his last service, and (i) his failure to engage in maritime service has been due to closure of navigation or economic conditions resulting in decreased shipping with consequent lack of opportunity to ship, or (ii) he has been receiving medical care and treatment since such last service at other than Public Health Service expense (42 CFR 32.17); (d) seamen taken from wrecked vessels of the United States and returned to the United States if sick or disabled at the time of their arrival (42 CFR 32.16).

In addition, it is provided by statute that:

> Officers and members of crews * * * employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service * * *; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom * * * and (3) collection of wages and bonuses, * * * have all the rights, benefits, exemptions, privileges, and liabilities under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. (50 U. S. C., App., Sec. 1291). See Iv, post.

Seamen who are employed by the Government of the United States (except those employed through the War Shipping Administration) are entitled to workmen's compensation benefits for injuries occurring while in the performance of duty. The benefits include medical, hospital, and other care or treatment required by the nature of the injury (5 U. S. C., Sec. 751).

In addition, federally financed vocational rehabilitation services are made available by the States to any merchant seaman who:

(a) while serving at any time after December 6, 1941, and prior to the termination of World War II, as declared by Presidential proclamation or concurrent resolution of the Congress,

(b) as an officer or member of the crew of a vessel owned or chartered by the Maritime Commission, or the War Shipping Administration, or

operated under charter from such Commission or Administration,

(c) is disabled as a result of disease or injury or aggravation of pre-existing disease or injury incurred in line of duty during such period and not due to his own misconduct.

Vocational rehabilitation services include corrective surgery or therapeutic treatment necessary to correct or substantially modify a condition which is static and constitutes a substantial occupational handicap; prosthetic devices; occupation licenses, tools, and equipment; training; vocational guidance and counselling; and maintenance during the rehabilitation process. (29 U. S. C. 31–41; 13 F. R. 4353.) Alaska, Hawaii and Puerto Rico are "states" within the meaning of the statute involved, but the Virgin Islands, Guam, and American Samoa are not "states" within the meaning of the statute.

Foreign Seamen

As is indicated by the provisions already summarized above, neither citizenship nor nationality is a criterion for eligibility for protection in any of the applicable law. The general admiralty law, the Jones Act (46 U. S. C., Sec. 688), providing compensation for injury or death, and the Public Health Act (42 U. S. C., Sec. 249, and 42 CFR, Secs. 32.41, 32.101, and 32.106) providing for medical care, extend to all seamen employed on vessels registered under the laws of the United States.

In the Jones Act, establishing an action for the injury and death of seamen based on negligence, the court has held:

> When Congress used the word "seamen" in the Jones Act, it employed a word of general application, embracing men of any nation who sail the seas. *Kyriaskos* v. *Goulandris,* 1945, 151 F. 2d 132, 136.

In addition, under the Public Health Act, provision is made for medical care to seamen on vessels of foreign registry. (See 42 CFR, Secs. 32.41, 32.101, and 32.106.)

2. *Exceptions.*

(a) *Public Vessels.*

See above.

(b) *Employees of third parties.*

Employees of an independent contractor do not have the rights of maintenance, wages, cure or repatriation against the shipowners[8] nor any claim for damages for injuries under the Jones Act against the shipowner.[9]

Qualified workers, however, regardless of the employment relation to the shipowner have a right to compensation for injury caused by the unseaworthiness of the vessel.[10]

(c) *Longshoremen and other workers in port.*

The shipowner is liable for compensation for injury to longshoremen caused by the unseaworthiness of the ship[11] and this rule is apparently applicable to any employee on board performing maritime work.

Formerly, longshoremen and other workers were entitled to benefits of seamen in respect to

---

[8] *Calvirno* v. *Farley*, 1938, 23 F. Supp. 654.

[9] *Calvirno* v. *Farley*, 1938, 23 F. Supp. 654.

[10] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 97; 66 Sup. Ct. 872.

[11] *Seas Shipping Co.* v. *Sieracki, supra.*

the shipowner's liability for injury or death caused by the shipowner's negligence.[12] With the passage of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., Sec. 901 ff), workers on vessels in navigable waters, other than masters or members of the crew are removed from the laws applying to seamen and are subject to a workmen's compensation system similar to shore-side workmen's compensation systems.

Longshoremen and similar harbor workers are not seamen for the purposes of maintenance and cure.[13]

Article 2

1. (a) *Sickness and injury.*

By general admiralty and maritime law a vessel and her owners are liable in case of sickness or injury of a seaman in the service of the ship for maintenance and care and for wages. *The Osceola*, (1902), 189 U. S. 158, 175; *Farrell* v. *U. S.*, 1949, 336 U. S. 511. For the duration of this liability see pages 517–519, *supra*.

The liability for maintenance and cure, which really means maintenance and care, is not limited to cases where the sickness or injury was caused by the seaman's employment or circumstances incidental to his work. *Loverick* v. *Warner & Co.*, 1941, 118 F. 2d 690, cert. den., 313 U. S. 577, 61 Sup. Ct. 1104; *Calmar S. S. Corp.* v. *Taylor*,

[12] *International Stevedore Co.* v. *Haverty*, 1926, 272 U. S. 50; 47 Sup. Ct. 19.

[13] *Seas Shipping Co.* v. *Sieracki*, 149 F. 2d 98; *C. Flanagan & Sons, Inc.* v. *Carken*, 1928 (Texas Civil Appeals), 11 S. W. 2d 392.

1938, 303 U. S. 525. It is enough that they became manifest during his employment. Also by general admiralty and maritime law a seaman has a right to indemnity for injuries caused by the unseaworthiness of the vessel or of its appurtenant appliances, and this right is not affected by the negligence of a fellow servant or the due diligence of the owner of the vessel. *Mahnich* v. *Southern S. S. Co.*, 1944, 321 U. S. 96, 100; 64 Sup. Ct. 455. In addition, under the Jones Act, a seaman has a right to recover damages for injuries arising from the negligence of the employer. *DeZon* v. *American President Lines*, 1943, 318 U. S. 660, 63 Sup. Ct. 814, rehearing den. 319 U. S. 780, 63 Sup. Ct. 1025. Under the Jones Act, the seaman's right to recover is not barred because of the negligence of fellow servants or his own contributory negligence,[14] but contributory negligence may reduce the amount of damages awarded.

1. (b) *Death.*

Under the Jones Act, the shipowner is liable for compensation for death caused by his negligence (46 U. S. C., Sec. 688), but neither general maritime law nor the Jones Act makes the shipowner liable irrespective of fault.[15]

2. *Exceptions.*

The following exceptions permitted in the Convention are found in the implementing legislation:

---

[14] *Socony-Vacuum Oil Co.* v. *Smith*, 1939, 305 U. S. 424, 59 Sup. Ct. 262.

[15] *Roberts* v. *United Fisheries Vessels Co.*, 1944, 141 F. 2d 288; cert. den. 323 U. S. 753, 65 Sup. Ct. 8; *Budgen* v. *Trawler Cambridge*, 1946, 65 N. E. 2d 533, 319 Mass. 315.

(a) *Injuries otherwise than in the service of the ship.*

The liability of a shipowner under the Jones Act is confined to injuries and to death resulting from injuries which occurred "in the course of employment." This phrase has been construed to permit recovery by a cook for injuries incurred on the dock while returning from shore leave,[16] and in the leading case *Aguilar* v. *Standard Oil Co.*,[17] recovery was permitted for injury which occurred on the property of the third party, which the seaman had to traverse in leaving the dock. The Supreme Court indicated that the liability of shipowner covers "all injuries and ailments incurred without misconduct on the seaman's part," "at least while he is on the ship," even though the injuries were not incurred in the actual performance of the seaman's duties, and that the same rule applies to all seamen on shore leave unless they leave the ship contrary to orders. *Ibid*, pages 731–733.

Provision of medical care by the Public Health Service is not dependent on whether the seaman's injuries or illness was incurred in the service of the ship. (42 CFR, Sec. 32.6 et seq.)

(b) *Wilful fault or misbehavior of the seaman.*

Liability for maintenance and care does not extend to cases of wilful misbehavior or wilful act of indiscretion on the part of seamen. The most common cases in which the shipowner assumes

---

[16] *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416; cert. den. 324 U. S. 872.

[17] 1943, 318 U. S. 724, 63 Sup. Ct. 930.

no liability are the cases of venereal disease[18] and drunkenness.[19]

Medical care under Public Health Service auspices is available to seamen injured in street brawls only at hospitals of the Public Health Service or those providing medical care under a contract with the Public Health Service (42 CFR, Sec. 32.21).

(c) *Intentional Concealment.*

The law appears to be that

> * * * the sailor's duty is to disclose whatever he as an ordinarily prudent person should have known was material to the risk, *Lindquist* v. *Dilkes*, 1941, 127 F. 2d 21, 24. See also *Burns* v. *U. S.*, 1945, 62 F. Supp. 603.

Wilful concealment may disqualify a seaman for maintenance and cure.[20] Concealment may be a defense in an action under the Jones Act for compensation for injuries.[21]

Medical care is provided by the Public Health Service without regard to concealment.

ARTICLE 3

1. *Shipowner's liability.*

The shipowner is under duty to provide maintenance and cure. A duty to provide medicines on board ship is imposed by statute (46 U. S. C., Sec. 666).

---

[18] *Zambrano* v. *M[illard]-McCormick Lines*, 1942, 137 F. 2d 537.

[19] *Lorie* v. *Am. Hawaiian S. S. Co.*, 1935, 78 F. 2d 819.

[20] *Neilson* v. *The Laura*, 1872, 17 Fed. Cases 1305.

[21] *DeZon* v. *American President Lines, Ltd.*, 1943, 318 U. S. 660, 63 Sup. Ct. 811.

> The maintenance exacted is comparable to that to which a seaman is entitled while at sea. * * * and "cure" is care including nursing and medical attention during such period as the duty continues. *Calmar S. S. Corp.* v. *Taylor,* 1938, 303 U. S. 525, 528, 58 Sup. Ct. 651.

The master has the duty to put into an intermediate port to give the seaman adequate medical care, when a serious accident has occurred and a port is within reasonable distance. The *Iroquois,* 1904, 194 U. S. 240, 24 Sup. Ct. 640.

The duty of the shipowner to furnish maintenance and cure (care) for the injured seaman, both before and after the adoption of this Convention, is the same as the duty provided for in the Convention. In the case of *Farrell* v. *United States,* 336 U. S. 511, 518, 1949, the Court stated:

> That the duty of the ship to maintain and care for the seaman after the end of the voyage only until he was so far cured as possible, seems to have been the doctrine of the American admiralty courts prior to the adoption of the Convention by Congress,[3] despite occasional ambiguity of language or reservation as to possible situations not before the court. It has been the rule of admiralty courts since the Convention.[4]

---

[3] See, for example, *The Wenlcydale,* D. C., 41 F. 829; *The Bouker No. 2,* 2 Cir., 241 F. 831; *Skolar* v. *Lehigh Valley R. Co.,* 2 Cir., 60 F. 2d 893; *The Point Fermin,* 5 Cir., 70 F. 2d 602.

[4] See, for example, *Lindgren* v. *Shepherd S. S. Co.,* 2 Cir., 108 F. 2d 806; *The Josephine & Mary,* 1 Cir., 120 F. 2d 459; *Luksich* v. *Misich,* 9 Cir., 140 F. 2d 812.

2. *Public Health Facilities.*

Subject to regulations, seamen employed on vessels registered, enrolled and licensed under the laws of the United States, as well as seamen on certain public vessels, are entitled to medical, surgical and dental treatment and hospitalization without charge at facilities of the Service, and under certain conditions at other public or private facilities at the expense of the Service. Prosthetic and orthopedic devices are authorized to be furnished. In addition, the Public Health Service is authorized to furnish such treatment and hospitalization for seamen of foreign flag vessels at the expense of the owner, master, or agent of the vessel. (42 U. S. C. 249.)

ARTICLE 4

The duration of the shipowner's liability for maintenance and cure is not defined by national legislation but is determined by the courts, case by case, in admiralty proceedings. In such proceedings, there is, of course, full opportunity for both parties to adduce expert medical opinion. The national law does not limit the liability of the shipowner to a period of 16 weeks, or to any other fixed period. *Calmar S. S. Corp.* v. *Taylor,* 1938, 303 U. S. 525, 58 Sup. Ct. 651, is the leading Supreme Court case on the subject. That case involved a seaman who stubbed his toe while on the voyage, and was found to have Buerger's disease, an incurable malady of the veins and arteries. The seaman, after receiving hospitalization at various hospitals and being paid small sums at various times for over a year, brought suit to recover for further maintenance and care

from the shipowner. The Supreme Court directed the trial court to find what the man needed in the immediate future for maintenance and care, held that it was an error to award a lump-sum payment for maintenance until death, computed by the use of mortality tables, and pointed out that the payment of such a lump sum would not constitute performance of the shipowner's duty to the seaman. With respect to the duration of the shipowner's liability for maintenance and care the Court stated:

> We can find no basis for saying that, if the disease proves to be incurable the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care and medical treatment. (Page 530.)[22]

If a seaman refuses to accept medical care under the auspices of Public Health Service when he is eligible for such care and it is available to him, the shipowner's liability is terminated.[23]

No schemes of compulsory sickness insurance, compulsory accident insurance or workmen's compensation (except as indicated under Article 1) are provided by Federal legislation. However, the Social Security Act amendments of 1946 (60 Stat. 978), which authorize the States to include maritime workers in their unemployment compensation programs, result in bringing seamen

---

[22] Cf. *The Point Fermin*, 70 F. 2d 602 (CA 5), and *Lukisch v. Misetich*, 140 F. 2d 812 (CA 9), cert. den. 322 U. S. 761; *Farrell v. United States*, 1949, 336 U. S. 511.

[23] *Marshall v. International Marine Co.*, 39 F. 2d 551; *Stewart v. United States*, 26 F. 2d 869.

within the compulsory sickness insurance schemes of the States of California, New Jersey, and Rhode Island.

ARTICLE 5

The duration of the shipowner's liability for wages is not defined by national legislation, but is determined by the courts, case by case, in admiralty proceedings. The national law makes no provision for payment only of a part of the wages of a seaman, and makes no provision for limitation of the wage payments to 16 weeks or any other fixed period. As already indicated under Article 4 above no schemes of compulsory sickness insurance, compulsory accident insurance, or workmen's compensation (except as indicated under Article 1) are provided by Federal legislation.

The shipowner is liable for wages so long as the voyage lasts[24] whether or not the seaman remains on board.[25] The liability extends for the term of the seaman's shipping articles whenever they cover a longer period than the voyage or more than one voyage.[26] The heirs of a deceased

---

[24] *The Osceola*, 1903, 189 U. S. 158; 23 Sup. Ct. 483; "* * * the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." *Farrell* v. *United States*, 1949, 336 U. S. 511, 517.

[25] *Halvorsen* v. *United States*, 1922, 234 Fed. 285 (W. D. Wash.); *Enochasson* v. *Freeport Sulphur Co.*, 7 F. 2d 674 (S. D. Texas).

[26] *Great Lakes S. S. Co.* v. *Geiger*, 1919, 261 Fed. 275 (CA 6); *Jones* v. *Waterman S. S. Co.*, 1946, 155 F. 2d 992 (CA 3).

seaman in case of his death during the voyage are entitled to wages to which the seaman would have been entitled had he remained on board.[27]

ARTICLE 6

The obligation to return destitute seamen, regardless of fault or cause of destitution, has been assumed by the United States Government. 26 U. S. C. Secs. 678, 679, 683. The law is administered by the State Department. The regulations are published in the Code of Federal Regulations, 22 CFR, Part 118; Foreign Service Regulations, Sec. XVIII–6.

When the destitution is the fault of the shipowner, he becomes liable for the passage.

> An American seaman, disabled in the service of the vessel and who was left in a hospital in a foreign port, is entitled to * * * transportation back to the United States and where these expenses are paid out of funds belonging to the United States, after notice to the owners of the vessel that they were liable for the same and demand made for payment, the owners of the vessel may be liable therefor. 29 Op. Atty. Gen. 54 (Dept. of Justice headnote).

The State Department regulations provide for return to some port in the United States.[28] A sick or injured seaman is entitled to passage to the port of shipment at the expense of the shipowner.[29]

---

[27] *Walton* v. *The Neptune*, 29 Fed. Cases 142, No. 17, 135.

[28] 22 CFR, Sec. 118.6.

[29] *The Centennial*, 1881, 10 Fed. 397; *Miller* v. *United States*, 1943, 51 F. Supp. 924.

ARTICLE 7

The employer and the United States Government are charged with the expense of burial of seamen: the employer when he would have been liable for maintenance and cure but for the death of the seaman; the Government if it would have been obligated to expend Government funds for his subsistence and repatriation.[30]

The Public Health Service is authorized to pay the expenses of preparing and transporting the remains, or the reasonable burial expenses, in the case of any patient dying in a hospital or station, to the extent that other public or private funds are not found to be available for such purposes. (42 U. S. C. 248 (e), Sec. 2 (b), Pub. Law No. 781, 80th Cong., 2d Sess.).

ARTICLE 8

The proper disposition of deceased seaman's effects left on board is required of the shipowner by statute. (46 U. S. C., Secs. 621, 625.) In addition, consular officers are responsible for the proper disposition of effects left ashore. (46 U. S. C., Sec. 624.)[31] The Surgeon General is authorized to dispose, pursuant to regulations, of the money and effects of deceased patients of the Service, many if not most, of whom are seamen. (42 U. S. C. 248 (d).)

---

[30] Executive Order 6942, Jan. 8, 1935. See also CFR, Sec. 118.7: "Deceased Seaman. The Consular Office shall take all appropriate measures as provided by statute or otherwise for the interment of deceased American seamen and for the proper disposition of their effects."

[31] Ibid.

ARTICLE 9

The shipping Commissioners of the United States Coast Guard are empowered by statute to act as arbiters of any issue submitted to them in writing by both the employer and the worker. (46 U. S. C., Sec. 651.)

There is no similar statutory provision with respect to procedure before a consul overseas. A consul may, however, act as an arbiter. 21 Op. Atty. Gen. 201. The regulations of the consular service provide that:

> It shall be the duty of a consular officer to take appropriate action as provided by statute or otherwise in connection with complaints, disputes and offenses arising aboard American vessels at ports within his jurisdiction,

and

> A consular officer is regarded as the adviser and counsel of the seamen and if an officer has reason to believe that a seaman is in difficulty either aboard ship or ashore, he is enjoined to investigate at once and take appropriate action. 22 CFR, Sec. 119.1, 119.2; Foreign Service Regulations, Sec. XIX–1, XIX–2.

In this connection, it has been held that a consul's decision with respect to rights under the shipping articles, where the dispute has been submitted to him, should not be disturbed in the absence of a showing that it was contrary to law.[32]

At the ports of the territories and possessions of the United States, United States customs officers perform those functions relative to the protection and relief of seamen pursuant to the

[32] *Uriarte* v. *United States*, 1926, 14 F. 2d 161.

Foreign Service Regulations which the United States Consuls perform in foreign ports.

ARTICLE 10

The question relative to the application of this Article is answered in the discussions of Articles 1, 4, 6, and 7 above.

ARTICLE 11

Equal treatment of all seamen on American ships is assured in the law except that the State Department does not assume any obligations to repatriate destitute foreign seamen who shipped at a foreign port except in cases of shipwreck or bankruptcy on the part of the owner. In case of abandonment by the shipowner such destitute seamen are given relief until they can be aided by the consul of their own country. 22 CFR, Part 118.

ARTICLE 12

There is nothing in United States law or practice which would be inconsistent with the requirements of this Article.

III

The general maritime law is enforceable in the Federal courts. United States Const., Art. III, Sec. 2. The Act of March 24, 1943 (50 U. S. C. App., Secs. 1291–1295), extending certain statutory benefits to seamen on United States or foreign flag vessels operated by the War Shipping Administration, provides that it shall be administered by the War Shipping Administration.

This Agency was abolished and its functions transferred to the United States Maritime Commission on September 1, 1946 (Act of July 8, 1946, Pub. Law No. 472, 79th Congress, 2d Session, Sec. 202).

The statutes providing for workmen's compensation and unemployment compensation are administered under the supervision and direction of the Secretary of Labor (Reorganization Plan No. 19 of 1950, Reorganization Plan No. 2 of 1949 (63 Stat. 1065); the statutes providing for vocational rehabilitation are administered under the supervision and direction of the Federal Security Administrator (29 U. S. C., Sec. 31 et seq.).

The statutes providing for medical care by the Public Health Service are administered by the Surgeon General of the Public Health Service under the supervision and direction of the Federal Security Administrator. (42 U. S. C., Sec. 202.)

The State Department administers the statutes concerned with subsistence and repatriation of seamen, overseas, and those concerned with the effects and burial of seamen deceased overseas. (46 U. S. C., Secs. 678, 679, 683, 824.)

IV

The Supreme Court has referred to the Convention in the following cases: *DeZon* v. *American President Lines Ltd.*, 1943, 318 U. S. 660; 63 Sup. Ct. 814; *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 1943, 318 U. S. 36; *Aguilar* v. *Standard Oil Co.*, 1943, 318 U. S. 724; 63 Sup.

Ct. 930; *Farrell* v. *United States*, 1949, 336 U. S. 511.

V

It is estimated that approximately 100,000 seamen served on American flagships subject to the provisions concerning shipowners liability, etc. No estimation is available at this time as to the number of seamen assisted in virtue of these provisions, or the expenditures incurred by shipowners and by the United States in respect of liability under this Convention.

Copies of previous reports on this Convention submitted to the I. L. O. have been sent to the Organizations named below and no observations of any nature have been received from these Organizations relative to these reports.

VI

Copies of this report are being mailed to:

United States Chamber of Commerce.
National Association of Manufacturers.
American Federation of Labor.

U. S. GOVERNMENT PRINTING OFFICE: 1950